United States Court of Appeals for the Second Circuit



APPELLANT'S APPENDIX

ORIGINAL

75-1246

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1246

UNITED STATES OF AMERICA,

Appellee,

FERGUS M. SLOAN, et al.,

Defendants-Appellants.

APPENDIX FOR APPELLANT ANDERSON

Carro, Spanbock, Londin, Rodman & Fass 10 East 40th Street New York, New York 10016 Attorneys for Defendant-Appellant Carl W. Anderson BPIS



PAGINATION AS IN ORIGINAL COPY

INDEX

	Page
Docket Entries	la
Indictment (as filed)	8a
Indictment (redacted)	23a
Motion to Dismiss Indictment, Jan 31, 1975	30a
Motion to Dismiss Indictment, March 12, 1975	35a
Memorandum in Support of Motion to Dismiss	38a
Supplementary Memorandum in Support of Motion to Dismiss	44a
Additional Memorandum in Support of Motion to Dismiss	59a
Charge and Supplementary Instructions	64a
Post-trial Motion (Rules 29(c), 33) and Affidavit in Support	161 a
Supplemental Affidavit in Support of Mctions under Rules 29(c) and 33 and with respect to Sentencing	205a
Memorandum Opinion and Order on Sentencing Motion	251a
Judgement	259a
Notice of Appeal	260a
Exhibits - In separate volume	



DOCKET ENTRIES

PROCEED

Cm 359 JUDGE KNAPP HMINAL DOCKET TITLE OF CASE THE UNITED STATES PERGUS M. SLOAN CARL W. ANDERSON 27 27 200 1 DONALD EUCKER (7, 2 7.) JOHN J. VILLANI(CAUX . Licia,) THOMAS C. KILDUFF (20 20 20 1) (1) Saxe, DANIEL PUSARO. Treas Enclor proprieses and proprieses 18, 15 78g,78h&78ff laws. (Ct Consp. to viol, S.E.C. ecurities fraud. (Cts2-9) (Nine Counts) 10-74 Filed indictment. ALL DEFENDATS (attys. present) Plead not guilty. Case asai med Knapp for all purposes, Motions returnable in 10 days. Feil fire court as to all defts, at \$10,000. P.R.B. to be co-signed all defts, to be photographed and fingerprinted. Ailed deft. Carl W. Anderson's notice of motion re: extend for pre-trial motions, ret: 10/4/74. (OVER)

			CLERK	S PEE	
Variation of	PROCEEDINGS	PLAIN			ENO
30-74 ID	eft's Villani& Eucker present without counsel. The cour	t app	pint	ed,	-
	Stanley S. Arkin, 2sq. to represent Deft. Eucker & Ele Esq. to represent deft. Villani. Knapp, J.	anor	Jacl	son	P
12: /7:	Kolduff- filed P.R.B. in the sum of \$10,000.		_		
9/24/7/-	Eucker- filed P.R.3. in the sum of \$10,000.		-		
9/24/74	7. Sloan- filed P.R.B. in the sum of \$10,000.				
9/24/7-	J. Vallani- filed P.R.B. in thesum of \$10,000.				
9/24/74	G. Anderson- filed P.R.B. in the slum of \$10,000.				
Q/9/74	T. Kilduff- filed notice of appearance by atty. (see at	у	SC		u j
0/9/74	C. Anderson- filed notice of appearance by atty. (see	tty.	15	=)	
9/9/74	F. Sloan- filed notice of appearance by atty. (see atty	111	,		•
1/13/74	J. Villani- filed notice of motion re: bill of particu	lars	and	dis	co
	and memorandums in support of motions. ret: 11/25	774.		士	
2/24/-4	C. Anderson- filed affdut. of Jerome J. Londin in supp	art o	fa	1590	CAT
-	of deft. for the temporary enlargement of his be		11.40	* 1	
12/20/74	Filed memo.and. or affdut. docketed 12/24/74. deft.	ndor:	soh!	be	11
1-1-1-1	limits are enlarged to permit him to crave to	1000.10	-	OM Poli	19.
	or thereafter, and to remain there on vacation s	arti1	1/6	175	þý
1	which date he must return to N.Y. Knapp. J. I.P.	-	-		
			- 1	4	B
124/75	Filed N.Y. Stock Exchange, Inc.'s affdvt. in opposition	n to	requ	PSC	4
	stay.	_	-		- A.
k' ———		proci	Filon	. 70	m
1/24/75	Filed memo. of law of N.Y. Stock Exchange, Inc.'s in o	PHUST		1	
	of deft. Villani for a stay of disciplimary proc	egair	gs	891	The state of
ÿ- <u>1</u>	by N.Y. Stock Exchange, Inc.	-		9	1
		-	-		1
(1/24/75	Filed J. Villani's notice of motion re: stay of proc	eedi	155		-
1	-over-	The state of the s		12.	

	The state of the s
1/29/75	Filed OPINION # 41820 Accordingly, the defts. motion to enjoin the New York Stock Exchange is denied. Knapp, J. mn
1/30/75	Filed defts John Villani and Donald Eucker's appeal from order of 1/29/75 denying injunction and/or stay of proceedings, etc. mailed notices.
1/31/75 1/3¥-75	Filed deft's Fergus M. Sloan, Jr. affidavit & notice of motion directing pltff. to serve a bill of particulars. Filed deft's memorandum of law in support of motion Re: Bill of particulars.
1/30/75	Filed defts. John Villani and Donald Eucker notice of appeal from order denying defts. an injunction and/or stay, atm. mailed notice of motion re: discovery and inspection.
1/31/75	and affdvt. ret: 2/10/75. Carl Anderson- filed notice of motion re: in camera inspection of Grand Jury minutes by Court under Rule 6(e) and to dismiss indictment under Rule 12, ret: 2/10/75.
1/31/75	Carl Anderson- filed notice of motion re: order striking prejudicial surplasage under rule 7(d).
1/31/75	Carl Anderson- filed memo. of law re: support of motion for discyment and inspection.
(1/31/75)	Carl Anderson- filed memo. of law re: support of motion for in camera inspection of Grand Jury minutes, etc.
1/31/75	Carl Anderson- filed notice of motion re: dismissal, etc. ret: 2/10/71 Carl Anderson- filed memo. of law re: support of motion for dismissal.
1	Carl Anderson- filed notice of motion re: bill of particulars, etc.
2-45-5	ret: 2/10/75. Filed deft. Anderson's memo of law ow support of motion b/p
2/10 /75	Deft. Villiani (atty. present) makes application for an extexsion of bail limits. Limits extended to include the Continental US. without application and foreign countries on 10 days, notice to the U.S. Atty's office, wherein, aletter from the U.S. Atty. stating there is no objection will be sufficient for the Court to grant the application Knapp, J.

b2-13-75 Filed memo-end. on motion docketed 1/31/75. Motion for an in camera insepction of grand jury minutes by court under Rule 6(e) and the motion to dismiss the indictment pursuant to Rule 12 is denied. Knapp, J. mn

	DOCKET LITERATE	
	PROCEEDINGS	Judi
)2-13-75	Filed memo-end. on motion docketed 1/31/75. Motion to dismiss counts one, eight and nine are denied. See, Rule 7(c) and Rule 8 FRCP. As to the motion to dismiss Counts two through seven of the indictment, see memoran dum and order dated 2/12/75. Knapp, J. mn	-
9 2-13- 75	Filed memorend. on motion docketed 1/31/75. Motion to strike prejudicial surplusage in the indictment is denied, except with respect to the last sentence in paragraph one of the indictment. Knapp, J. mn	
03-06-75	Filed OPINION # 41877 In summary, we find that the prosecution for the crimes charged in counts two through seven of the indictment is barred by the Statute of limitations. Accordingly, counts two through seven are dismissed. Knapp, J.mr. Filed deft. C. Anderson's suppl. memo of law in support of motion to	,
33-12-75	dismiss count 9 of the indictment. Filed deft. C. Anderson's notice of motion re: dismissal under Rule 12(b).	,
53-12-75)	Filed deft. C. Anderson's memo. of law in support of motion to dis-	
23-13 75	Filed transcript of AECO AD OF PROCEPTINGS, detell Jan 24, 1975.	
03-14-75	Deft, Kildriff & Atty. (Michael C. Devine, Esq.) present. Deft. withdraws his plea of not guilty & pleads guilty to count 1 only. Pre-sentence investigation ordered. Sentence adj'd. to 5-15-75 at (9:30) Bail conditions cont'd. Deft. Eucker & Atty. (Stanley S. Arkin, Esq.) present. Deft. withdraws his plea of not guilty & pleads guilty to count 9 only. Pre-sentence investigation ordered. Sentence adj'd. to 5-15-75 at 9:30. Bail cont'd. Bonsal, J. Filed Memorandum and Order that after reviewing the papers sub-	
	mitted on behalf of this application, it is the court's view that the motion should be denied. Knapp, J. mn (deft. Anderson's motion for reconsideration of motion to dismiss count 9)	*
33-31-75	Deft Sloan Jr. (Atty. Harry Praustein present) Deft. withdraws his plea of not guilty & pleads guilty to Count I only. P.S.I. ordered, sentence adjd. to 5-15 75 at 9:30 A.M. Rail condition continued. Conner J.	18
04-02-75 24-03-75 34-04-75 34-08-75 34-09-75	Deft. Anderson & Atty. (Jerome J. Londin. Esq.) and deft. Villani & Atty. (Eleanor Jackson Piel, Esq.) present. Jury trial begun before Judge Knapp. Trial cont'd.	A STATE OF THE PARTY OF THE PAR
34-10-75 34-11-75 34-14-75 34-15-75		· Park

cont'd, on next page

	DATE	PROCKEDINGS
! i	4-16-75	Jury trial cont'd, as to defts, Anderson & Villani,
_0	4-17-75	
0	4-21-75	
0	4-22-75	
0	4-23-75	11 11
_04	4-24-75	11 11
1	4-25-75	
0	4-28-75	11 11 1.
0	4-29-75	" Jury retires to deliverate at 12:40PM.
04	4-30-75	Trial cont'd, and concluded, Jury resumes deliberations at 10AM. Jury returns with a verdict at 2:15PM. Deft. Anderson guilty on count 1 not guilty on count 2. Deft. Villani not guilty on counts 1 and 2. Pre-sentence investigation ordered on deft. Anderson. Sentence adj. to 6-16-75 at 9:30. Deft. cont'd, released on own recognizance. Knapp. J.
-		1724 100
	15-75	Filed transmipt of record of proceedings dated #/ 44k/h/c/25
	15-75	Filed transmit of record of proceedings dated 4/12-21-12-23/25
	28-75	Fled transmit of record of proceedings dated 4/11-14-15-16/25- Filed transmit of record of proceedings dated 4/11-14-15-16/25- Filed transmit of record of proceedings dated 4/12-21-22-23/25 Filed transcript of record of proceedings, dated 4/14-25-28-20/25 Filed transcript of record of proceedings, dated 7/21-21-22-20/25 Filed transcript of record of proceedings, dated 7/21-21-22-20/25
100	10-75)	Filed deft. Carl W. Anderson's notice of motion re: judgment of
		acquittal under rule 29(c) and alternatively, for a new trial under rule 33 ret: 6-16-75.
06-1	2-75	Pilod dofe And a
		Filed deft. Anderson's suppl. affdvt. in support of motion under Rules 29(c) and 33 and with respect to sentencing.
606- 2	23-757	Filed Govt.'s request to charge.
06-2	23-75	Filed deft. D. Eucker's notice of morion re: digmine come of
00-4	(3-75)	rited Gove, s bill of particulars and response to motions for die
05-2	13-75	COVELY and to dismiss the indictment
6		Filed memo. of N.Y. Stock Exchange, Inc. in opposition to motion of deft. Villani for stay of disciplinary proceedings against
-	7-75	HAM DY N.I. SEOCK EXCHANGE INC.
7-2	23-75	Filed memo. of law in support of deft. s D. Fucker morisone distinct
W0-2	3-757	counts 2 through / or me indictment
06-2	3.75	Filed Govt.'s memo. of law,
	3-75	Filed Govt. 's memo. of law re: deft.'s motion to enjoin. Filed deft. D. Eucker's notice of motion re: dismiss cts 2-7.
		Filed memo, of law in support of deft. Eucker's motion for dismissal
·		***

	PHOCEEDING3	Jud
-		
-20-750	Filed deft, Anderson's memo, of law in support of motion under	+
The state of	Rule 35 to set aside sentence of imprisonment.	-
25 75	Filed deft, F. Sloan, Jr's notice of motion re: withdraw guilty	1
25-75	plea etc.	I
		1
-25-73	transcript of record of proceedings, dated 3 - 14 - 75	+
	regal transcript of record of proceedings, dated 4-3-75	+-
77-17	ingibility of the second of bioceast rasi surveys as 2 - 32	+
0E 7E	Filed deft. Donald Eucker's notice of appeal from judgment of	+
-25-75	6 16 75 Willed conice to II S Atty, and dett.on 0-3U-/J.	1
	(deft. D. Fucker sentenced 6-16-75 -judgmt docketed 0-30-75 pur. Kna	PP,
30-75	DONAID EUCKER (atty.present) Filed Judgment - dert. is committed	1.
	to the custody of the Arty, Gen'l, for imprisonment for a p	eri
1	of ONE (1) YEAR and ONE (1) DAY. Execution of said sentence	9 1
	stayed pending appeal. Present ball continued and deft. to	-
	new bail pending appeal. On deft.'s motion, with the comments of the Govt., the open counts are dismissed, Knapp, J. issue	d s
1		-
	copies. (deft.T. Kilduff sentenced 6-16-75-judgmt.docketed 6-30-75 pur. Kna	00
30-75	THOMAS C. KILDUFF (atty.present) Filed JUDGMENT- the imposition of	7
30-73	sentence is suspended on count I and the deft. is placed	+
	on unsupervised probation for a period of THREE (3) YEARS,	13
	pursuant to the standing probation order of this Court.	+
7	On deft, s motion with the consent of the Govt, the open	1
***	counts are dismissed, Knapp. J. issued all copies	T
¥	(deft. C. Anderson sentenced 6-16-75-judgmt. docketed 4-3-75 pur.	
-03-75	CART W AWNERSON (arty present) Filed Judgment - deft, is committe	
	to the custody of the Atty. Gen'l. for imprisonment for a Del	• • •
	of ONP (1) VEAP and ONE (1) DAY. Exemption of the sentence	
(+ 1)	staved mending appeal. Present bail cont d.and deft. to file	4
\	new bail pending appeal. Knapp, I. issued all copies.	+
	(deft. F. M. Sloan, Jr. sentenced 6-16-75-judgment docketed 7-3-75 po	1
7-03-75	PEDCUS M STOAN IN (afty, present) Filed Judgment- delt. 18 Committee	5 - 4
7	to the custody of the Atty. Gen 1. for imprisonment for a wes	
0	of ONE (1) YEAR and ONE (1) DAY on COURT L. Execution of "Le	
1	contends is stayed needing anneal. Present Dall Comt G. and	5 . 1
610	to file new hall nending appeal. On deft. & motion with the	
114	of the Govt., the open counts are dismissed. Knapp, J. issued	
-		
-03-75	Filed OPINION # 42730- deft. C. Anderson's moves to set aside	1
•	fudement of conviction Accordingly, Anderson's MOCION CO.	2
	ger saids the centence of imprisonment is denied. Final Juda	SE
9	will enter within five days. The execution of sentence will	
-	stayed pending appeal. Knapp, J. mo	4
100 75	Pulled ontwood 60720 defe T Class names for large to wichdress Kil	
-03-75	Filed OPINION 42729 - deft. F. Sloan moves for leave to withdraw hi	2
+	plea In conclusion, I may say that the letter was totally without effect upon the sentence imposed, which is the minimum	7
-	I felt could conscientiously be arrived at. Accordingly, the	
	motion granting leave to withdraw his plea is denied. Knappid	
-	MACTAL STRUCTUR TEGAS PA MATHEMAN HAS BOLD TO THE PARTY	7. 7

PROCEEDINGS

	5 CARL. W. ANDERSON-Filed Corrected Judgment-(atty.present)deft. is committed to the custody of the Atty. Gen'l. for imprisonment a period of ONE (1) YEAR and ONE (1) DAY. Execution of the sentence is stayed pending appeal. Present bail continued and deft. to file new bail pending appeal. Knapp. J. Issued al
	a period of ONE (1) YEAR and ONE (1) DAY. Execution of the
	and deft. to file new bail pending appeal. Known to versel
	copies.
07-08-75	P/1-1 0 - 1 - 661
01-00-13	Filed Govt.'s affdyt. re: opposition to deft. Anderson's motion to judgment of acquittal.
passa	
07-08-75	Filed Govt.'s affdyt. re: response to motion of deft. Pergus M. San
- A	to withdraw guilty plea.
07-16-75	Filed deft, Fergus M. Sloan Jr.'s reply affdyt re: Govt.'s
	opposition to deft.'s motion to withdraw guilty plea.
07-16-75	
11-10-12	C. Andersen-filed notice of appeal from judgment of 6-7-75.
	Mailed copies to U.S. Atty. and deft on 7-17-75.
7-16-75	Filed notice that the record on appeal has beencertified and
-	transmitted to the U.S.C.A.
7-16-75	Piled extended was possess to be a transfer to the piles of the piles
1-10-73	Filed stipulation re: papers to be transmitted to U.S.C.A.
12-13-74	Filed Goyt's Notice of Readiness for trial.
	TABLE 1811 & ANGESTS OF RESIDENCE LOS LINES.
06-2-75	Filed tramscript of record of proceedings dtd: March 13-75.
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1	一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个
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P. Translation	RAYMOND F. BURCHAPDT. Clerk
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IICROFILM SEP111974 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

74 CMB. 859

INDICTMENT

74 Cr.

FERGUS M. SLOAN, JR.,
CARL W. ANDERSON,
DONALD EUCKER,
JOHN J. VILLANI, and
THOMAS C. KILDUFF,

Defendants.

SEP 10 1974
S. O. OF N. 1

The Grand Jury charges:

Introduction

- 1. At all times relevant herein, Orvis Brothers
 & Co. ("Orvis"), a New York limited partnership doing business
 as a securities brokerage firm, was a member of the New York
 and American Stock Exchanges and the National Association of
 Securities Dealers, Inc., having its principal place of business at 30 Broad Street, New York, New York. Orvis transacted
 a business in securities on its own behalf and on behalf of
 approximately 23,000 customers. In 1969 and 1970 Orvis experienced substantial losses which endangered its net capital
 and impaired its ability to remain solvent. As of June 3, 1970,
 Orvis was suspended as a member of the New York and American
 Stock Exchanges.
 - 2. The defendant FERGUS M. SLOAN, JR., at relevant times herein, was the managing partner of Orvis and, as such, had and exercised the overall responsibility for Orvis' operations.

- 3. The defendant CARL W. ANDERSON, at relevant times herein, was the Chairman of the Executive Committee of Orvis and, as such, had the responsibility of assuring that the policies of the Executive Committee were enforced. In addition, ANDERSON was the partner in charge of corporate finance.
- 4. The defendant DONALD EUCKER, at relevant times herein, was the partner in charge of operations at Orvis and a member of the Executive Committee. As such, EUCKER was responsible for the day to day operation of Orvis, including the supervision of "cage" operations and maintaining proper segregation of customer-fully-paid-for securities.
- 5. The defendant JOHN J. VILLANI, at relevant times herein, was a partner and a member of the Executive Committee.
- 6. The defendant THACMAS C. KILDUFF, at relevant times herein, was the partner in charge of financial operations and a member of the Executive Committee.

COUNT ONE

The Conspiracy

The Grand Jury further charges:

1. From on or about the 1st day of September, 1968, up to and including the 30th day of June, 1971, in the Southern District of New York and elsewhere, FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI, and THOMAS C. KILDUFF, the defendants, and Orvis, named herein as a co-conspirator but not as a defendant, and others to the Grand Jury

H. Jr. : 100

Indictment

known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States and to violate the following laws of the United States: Title 15, United States Code, Sections 78g, 78h, 78j(b), 78q(a) and 78ff; 12 C.F.R. 220; 17 C.F.R. Sections 240.8c-1, 240.10b-5, 240.17a-3, 240.17a-4, 240.17a-5.

OBJECTS OF THE CONSPIRACY

- 2. It was part of said conspiracy that said dzfendants and their co-conspirators unlawfully, wilfully and
 knowingly would, directly and indirectly, hypothecate and
 arrange for and permit the continued hypothecation of fully
 paid for securities carried for the account of customers of
 Orvis under circumstances that permitted such securities to
 be hypothecated and subjected to liens and claims of pledgees.
- 3. It was further a part of said conspiracy that said defendants and their co-conspirators unlawfully, wilfully and knowingly would, directly and indirectly, by the use of means and instrumentalities of interstate commerce, of national securities exchanges, and of the mails, use and employ manipulative and deceptive devices and contrivances in connection with the purchase and sale of securities in contravention of Rule 10b-5 (17 C.F.R. Section 240.10b-5), a rule prescribed by the United States Securities & Exchange Commission (S.E.C.) as necessary and appropriate in the public interest and for the protection of investors.

- 4. It was further a part of said conspiracy that said defendants and their co-conspirators unlawfully, wilfully and knowingly would, directly and indirectly, make, keep and preserve and cause to be made, kept and preserved false and fraudulent books, accounts and other records of Orvis which purported to reflect the true, accurate and current financial condition of Orvis, when in truth and in fact as the defendants well knew, said books, accounts and other records were materially false and fraudulent, in contravention of Rules 17a-3 and 17a-4 (17 C.F.R. Sections 240.17a-3 and 240.17a-4), rules prescribed by the S.E.C. as necessary and appropriate in the public interest and for the protection of investors.
- 5. It was further a part of said conspiracy that said defendants and their co-conspirators umlawfully, wilfully and knowingly would, directly and indirectly, make and cause to be made false and misleading statements in applications, reports and documents required to be filed with the S.E.C., which statements were false and misleading with respect to a material fact or facts, in contravention of Rule 17a-5 (17 C.F.R. Section 240.17a-5), a rule prescribed by the S.E.C. as necessary and appropriate in the public interest and for the protection of investors.
- 6. It was further a part of said conspiracy that the defendants and their co-conspirators unlawfully, wilfully and knowingly, would, directly and indirectly, extend credit and arrange for the extension and maintenance of credit to and

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Indictment

for customers of Orvis on securities in contravention of Regulation T of the Board of Governors of the Federal Reserve System (12 C.F.R. Section 220), a regulation prescribed by the Federal Reserve System for the purpose of preventing the excessive use of credit for the purchase or carrying of securities.

MEANS OF THE CONSPIRACY

- 7. Among the means by which the defendants and their co-conspirators would and did carry out the conspiracy were the following:
- (a) In or about April, 1969, the defendants

 SLOAN, ANDERSON, EUCKER, VILLANI, and KILDUFF, discovered

 that Orvis was in violation of New York Stock Exchange Rule

 325 which prohibits a member firm's aggregate indebtedness

 to exceed twenty times its net capital. Instead of reporting

 the serious financial condition of Orvis to the Exchange and

 SEC, as required, the defendants and their co-conspirators

 would and did engage in a course of conduct to fraudulently

 conceal the true financial condition of Orvis.

- (b) The defendants SLOAN, ANDERSON, VILLANI, EUCKER and KILDUFF and others would and did show as valid present income and good capital on the books and records of Orvis projected commissions receivable from Clinton Oil Company ("Clinton") on the sale to the public of an estimated \$20,000,000.00 of participating interests in Clinton Oil and Gas Programs in 1969. In order to accomplish this the defendants would cause the opening of a customer's cash account in the name of Clinton Oil Company to record projected commissions receivable in 1969 in the amount of \$797,100.00 and to reflect the account on the books and records of Orvis so as to overstate the firm's capital in the 17A-5 report filed with the SEC on October 16, 1969.
- (c) The defendant KILDUFF with the consent of the other defendants would cause the omission of certain expenses, namely commissions payable to the firm's sales representatives, from the books and records of Orvis for the purpose of overstating the firm's net capital.
- (d) The defendants SLOAN, EUCKER and KILDUFF with the consent of the other defendants, would use \$500,000.00 paid to Orvis on August 22, 1969, on account of the commissions receivable from Clinton, to offset losses in excess of \$1,000,000.00 realized in 1969 in the Orvis trading account without reducing the outstanding debit in the Clinton receivable account.

- (e) The defendants SLCAN, EUCKER, and KILDUFF with the consent of the other defendants would and did post without cost as securities in the firm's capital in April and May, 1969, 9,344 shares of Clinton Oil common stock, valued at \$275,000.00, which the defendants well knew had been delivered for sale by a customer.
- (f) The defendants SLOAN and EUCKER with the consent of the other defendants would and did reduce the firm's capital investment subject to 30% haircut provision of Rule 325. In order to accomplish this SLOAN and EUCKER would and did cause the posting on the books and records of a phony sale of 80,000 shares of Clinton Oil common stock for \$880,000.00 to the Clinton Oil Pension Fund.
- (g) The defendants SLOAN, ANDERSON, EUCKER,

 VILLANI and KILDUFF would and did cause the extension and

 maintenance of credit to customers' cash accounts in violation

 of Reg T including but not limited to the following:

MARTIN ACCOUNT	DEBIT EALANCE 8/31/69
(52-6042)	\$326,000.00
BOZEMAN ACCOUNT	
(14-1682)	\$133,000.00
FUND OF LETTERS ACCOUNT	
(05-6910)	\$484,000.00
AQUARIOUS ACCOUNT	
(03-4862)	\$ 32,740.00

: 1.

11/2

Indictment

(h) The defendant EUCKER with the consent of the other defendants and others would and did permit and cause as a regular business practice in 1969 and 1970 the hypothecation of fully paid for securities held by Orvis for the account of customers to bank and stock loans obtained for the benefit of Orvis in amounts in excess of \$7,000,000.00.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

- 1. On or about February 5, 1969, the defendant ANDERSON caused Orvis to issue a check to Mrs. Rosa Bull in the amount of \$201,778.75 on account of the sale of 8,425 shares of unregistered International Control stock with knowledge that said trade had been disclaimed by the alleged purchaser of the stock.
- 2. On or about April 16, 1969, the defendants SLOAN and KILDUFF with the consent of ANDERSON, EUCKER and others caused the receipt without cost of 4,344 shares of Clinton Oil stock into the Orvis trading account (62-2070) which were delivered to Orvis for sale for the account of a customer.
- 3. In or about April, 1969, the defendant KILDUFF told the other defendants that he estimated the rate.

of Orvis' aggregate indebtedness to net capital to be in excess of 30:1. At that time each defendant agreed that everything should be done to keep the firm in business, including the falsification of the books and records of Orvis.

- 4. On or about April 30, 1969, the defendants SLOAN, EUCKER and KILDUFF with the consent of the other defendants, caused the erroneous posting in the customers cash account captioned Clinton Oil Company (55-1400) a cash debit of \$797,100.00.
- 5. On or about May 15, 1969, the defendants SLOAN and KILDUFF caused the receipt without cost of 5,000 shares of Clinton Oil stock into the Orvis trading account (62-2070) when in fact the shares were delivered for sale to the firm at a fixed price.
- 6. On or about August 20, 1969, the defendants attended a General Partners Meeting of Orvis held at the New York Athletic Club in New York City.
- 7. On or about August 22, 1969, the defendants SLOAN, EUCKER and KILDUFF caused the erroneous credit to the Orvis Trading Account (62-2075) of \$500,000.00 received as advance payment on commissions receivable from Clinton.
- 8. On or about August 28, 1969, the defendants SLOAN, EUCKER and KILDUFF caused the transfer of securities from a subordinated loan account to the Clinton Oil Account (55-1400).

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- 9. On or about August 28, 1969, the defendants SLOAN and AMDERSON caused the erroneous posting of a sale of 80,000 shares of Clinton Oil for \$880,000.00 from the Orvis Trading and Investment Accounts (62-2075, 62-2080) to the Clinton Oil Pension Fund.
- 10. On or about September 3, 1969, the defendants received a telegram from Clinton Oil refusing to confirm the 80,000 share trade.
- 11. In or about September, 1969, the defendant SLOAN met with Rick Clinton in Wicheta, Kansas.
- 12. On or about October 16, 1969, the defendants SLOAN, ANDERSON, EUCKER, VILLANI and KILDUFF caused the filing of a materially false and incomplete Financial Questionnaire (Form X17a-5) by Orvis with the SEC in New York City.
- 13. In or about the first week of December, 1969,
 the defendant SLOAN caused the mailing of a customers' statement
 to the Clinton Oil Pension Fund.

- 14. On or about December 8, 1969, the defendant SLOAN received a telegram for Clincon Oil disclaiming an alleged \$880,000.00 due Orvis for the purchase of 80,000 shares of Clinton Oil common stock.
- 15. In or about October and November, 1969, the defendant EUCKER told an employee of Orvis to use customers' fully paid securities as collateral on bank loans obtained by Orvis.
- 16. In or about October and November, 1969, the defendant EUCKER with the consent of the other defendants instructed employees of Orvis to continue the extension of credit to certain customers cash accounts which were in violation of Reg. T.

(Title 18, United States Code, Section 371.)

COUNTS 2 THROUGH 7

The Grand Jury further charges:

1. From on or about the 1st day of March 1969, up to and including the 16th day, of October, 1969, in the Southern District of New York, Orvis Brothers & Co., 30 Broad Street, New York, New York ("Orvis"), a member of a national securities exchange, directly transacted business in securities directly with and for others not members of a national securities exchange and, further, was a broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934, as amended, and therefore was required by law [17 C.F.R. 240-17a-3(a)] to make and keep accurate and current books and records.

2. From on or about the 1st day of March, 1969, up to and including the 16th day of October, 1969, FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI, and THOMAS C. KILDUFF, the defendants, unlawfully, wilfully and knowingly, did falsely make and maintain Orvis' books and records in a fashion which represented that Orvis' financial condition was sound when, in truth and in fact, as the defendants then and there well knew, Orvis was in serious financial trouble and was suffering significant losses which substantially impaired, and threatened to impair, its ability to remain solvent, which books and records hereinafter listed, were not current and accurate as hereinafter described:

COUNT	DATE OF FALSE ENTRY	FALSE ENTRY	DEFENDANTS
2	4/30/69	Recording of \$797,100 as a debit in the Orvis' cash account (55-1400), captioned Clinton Oil Co. 1969 Oil units.	Sloan Anderson Eucker Villani Kilduff
3	8/26/69	Recording of \$500,000 as a credit to Orvis' Firm trading account (62-2075).	Sloan Anderson Eucker Villani Kilduff
4	8/28/69	Transferring of securities from R.P. Clinton's subordinated loan account (06-8808), to account 55-1400 to secure the debit balance	Sloan Anderson Eucker Villani Kilduff
5	8/28/69	Recording of a fictitious sale by Orvis of 80,000 shares of Clinton Oil stock for \$880,000 to the Clinton Oil Co. Pension Fund, (Account No. 06-2075).	Sloan Anderson Eucker Villani Kilduff

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COUNT	DATE OF FALSE ENTRY	FALSE ENTRY	DEFENDANTS
6	4/15/69	Recording of 4,344 shares of Clinton Oil stock without attributing cost to the Firm trading account, 62-2070	Sloan Anderson Eucker Villani Kilduff
7	5/20/69	Recording of 5,000 shares of Clinton Oil stock without attributing cost to the Firm trading Account, 62-2070	Sloan Anderson Eucker Villani Kilduff

(Title 15, United States Code, Sections 78q(a) and 78ff, 17 C.F.R. Section 240.17a-3).

COUNT 8

The Grand Jury further charges:

- 1. Orvis Brothers & Co., (Orvis) was a brokerage firm, a member of the New York Stock Exchange and American Stock Exchange, and was registered as a broker and dealer pursuant to Section 15 of the Securities Exchange Act of 1934, as amended, and therefore was required by law (17 C.F.R. 240-17a-5), to file for the 1969 fiscal year a report of financial condition containing the information required by Form X-17A-5.
- 2. On or about the 16th day of October, 1969, in the Southern District of New York, FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI, and THOMAS C. KILDUFF, the defendants, unlawfully, wilfully and knowingly did make, and cause to be made, statements in an X-17A-5 report of financial condition of Orvis which statements were false and misleading with respect to material facts in that:

- a) Statements of the trading and investment accounts of Orvis were falsely inflated.
- b) Statement of the correction of customers' fully paid securities loaned and pledged in error was false.
- c) Statement of balances in customers' cash accounts was falsely inflated.

(Title 15, United States Code, Section 78q(a) and 78ff and 17 C.F.R. Section 240.17a-5; Title 18, United States Code, Section 2.)

COUNT 9

The Grand Jury further charges:

- 1. From August 1, 1969 to June 3, 1970, Orvis
 Brothers & Co., was a brokerage firm, a member of the
 New York Securities and Exchange, and a registered broker
 and dealer pursuant to Section 15 of the Securities and
 Exchange Act of 1934, and, as such, was subject to the
 provisions of Rule 8c-1 (17 C.F.R. Section 240.8c-1),
 a rule prescribed by the S.E.C. for the protection of
 investors.
- 2. From on or about the 1st day of August,
 1969 up to and including the 3rd day of June 1970, in
 the Southern District of New York, FERGUS M. SLOAN, JR.,
 CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI, and
 THOMAS C. KILDUFF, the defendants, unlawfully, wilfully

and knowingly, did, directly and indirectly, hypothecate and arrange for and permit the continued hypothecation of fully paid for securities carried for the account of customers of Ortis under circumstances that permitted such securities to be hypothecated and subjected to liens and claims of pledges in amounts up to \$7,000,000.00.

(Title 15, United States Code, Sections 78h and 78ff and 17 C.F.R. Section 240.8c-1; Title 18, United States Code, Section 2.)

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PAUL J. CURRAN

United States Attorney

INDICTMENT

TOTAL TO COMMON OF THE PARTY OF	CONTROL T	- x	
UNITED STATES OF .	MIURICA,	·	
-/-		:	
Dougld M. (LOAY,) CACL W. ACTIONS, ESTALD DESCRIPTION,		:	74 Cr. 559 (44)
Jen J. Vincell, of thomas c. income	យាជំ •		
	Defendants.		

The Crand Jury charges:

Introduction

- 1. At all times relevant herein, Orvis Brothers & Go. ("Orvis"), a New York limited partnership doing business as a securities brokerage firm, was a newber of the New York and American Steek Euchanges and the National Association of Securities Dealers, Inc., having its principal place of business at 36 Broad Street, New York, New York. Orvis transacted a business in securities on its can behalf and on behalf of approximately 23,000 customers. In 1969 and 1970 Orvis experienced substantial losses which endangered its net capital and impaired its ability to remain solvent.
- 2. The defendant FERGUS M. SLOAM, JR., at relevant times herein, was the managing partner of Orvis and, as such, had and exercised the overall responsibility for Orvis' operations.
- 3. The defendant CAPL W. ANDERSON, at relevant times herein, was the Chairman of the Enecutive Committee of Orvis and, as such, had the responsibility of assuring that the policies of the Executive Committee were enforced. In addition, ANDERSON was the partner in charge of corporate finance.

- A. The defendant NOTUD ROOM, at relevant along havein, who the parimer in charge of operations at Ords and a number of the Proportion Constitues. As such, the Theorem was responsible for the day to day operation of Ords, including the subscription of "caps" operations and relationing proper segregation of customer-fully-paid-for securities.
- 5. The defendent JOHN J. VIILANI, at relevant a times herein, was a partner and a partner for the Executive Committee.
- 6. The defendant THOMAS C. HILDEFF, at relevant times berein, was the partner in charge of financial operations and a member of the Engentive Committee.

COURT OFF

The Conspiracy

The Grand Jury further charges:

1. From on or about the 1st day of September.

1958 up to and including the 30th day of June, 1971, in the Southern District of New York and elsewhere, FERGUS M. SLOAM, JR., CARL W. ANDLESON, DONALD EUCKER, JOHN J. VILLANI, and THOMAS C. KILDUFF, the defendents, and Orvis, named herein as a co-conspirator but not as a defendant, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States and to violate the following laws of the United States: [Statutory references omitted at the Court's direction.]

OBJECTS OF THE CONSPIRACY

2. To was further a part of said conspiracy that said defendants and their co-conspirators unlawfully, wilfully and knowledgly would, directly and indirectly, make, keep and preserve and cause to be made, kept and preserved false and frauduletat books, accounts and other records of Orvis which

perpented to reflect the true, accurate and current financial condition of Orgis, when in truth and in fact as the defendants well know, said tooks, accounts and other records were naterially false and fraudulent, in contravention of Rules 17a-3 and 17a-4 (17 C.F.R. Sections 240.17a-3 and 240.17a-4), rules prescribed by the S.E.C. as necessary and appropriate in the public interest and for the protection of inventors.

3. It was further a part of said conspiracy that said defendants and their co-conspirators unlawfully, wilfully and knowingly would, directly and indirectly, make and cause to be made false and misleading statements in applications, reports and documents required to be filed with the S.E.C., which statements were false and misleading with respect to a material fact or facts, in contravention of Rule 17a-5 (17 C.F.E. Section 240.17a-5), a rule prescribed by the S.E.C. as necessary and appropriate in the public interest and for the protection of investors.

ITANS OF THE CONSPIRACY

- 4. Among the means by which the defendants and their co-conspirators would and did carry out the conspiracy were the following:
- (a) In or about April, 1969, the defendants SLOAN, ANDERSON, EUCKER, VILLANI, and KILDUFF, discovered that Crvis was in violation of New York Stock Exchange Rule 325 which prohibits a member firm's aggregate indebtedness to exceed twenty times its net capital. Instead of reporting the serious financial condition of Crvis to the Exchange and SEC, the defendants and their co-conspirators would and did engage in a course of conduct to fraudulently conceal the true financial condition of Crvis.

- PUCHUR and ETHOUTP and others would and did show as valid prepent income and good capital in the tooks and records of Orvis projected consistions receivable form Clinton Cil Company ("Clinton") on the sale to the public of an estimated \$20,000,000.00 of participating interests in Clinton Cil and Cas Programs in 1969. In order to accomplish this the defendants would cause the opening of a customer's cash account in the name of Clinton Cil Company to record projected consistions receivable in 1969 in the amount of \$797,1000.00 and to reflect the account on the books and records of Crvis so as to overstate the firm's capital in the 174-5 report filed with the SEC on Ceteber 16, 1969.
- (c) The defendant KILDUFF with the consent of the other defendants would cause the omission of certain expenses, namely commissions payable to the firm's sales respresentatives, from the books and records of Orvis for the purpose of overstating the firm's net capital.
- (d) The defendants SLOAN, EUCKER and KILDUFF with the consent of the other defendants, would use \$500,000.00 paid to Grvis on August 22, 1969, on account of the commissions receivable form Clinton, to offset losses in excess of \$1,000,000.00 realized in 1959 in the Orvis trading account withour reducing the ourtstanding debit in the Clinton receivable account.
- (e) The defendants, SLOAN, EUCKER, and KILDUFF with the consent of the other defendants would and did post without cost as securities in the firm's capital in April and May, 1969, 9,344 shares of Clinton Cil common stock, valued at \$275,000.00 which the defendants well knew had been delivered for sale by a customer.

(f) The defenders (LOTE and IECTER with the economic of the other defendant white would and did reduce the first's expital investment subject to 30% haircut provision of the 325. In order to accomplish this SLOAN and LUCKER would and did cause the posting on the books and records of a phony sale of 50,000 shares of Clipton Gil common stock for \$850,000.00 to the Clinton Gil Pension Fund.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts were consisted in the Southern District of New York and elsewhere:

- 1. On or about April 16, 1969, the defendents SLOAN and KILDUFF with the consent of ANDERSON, EUCKER and others caused the receipt without cost of 4,344 shares of Clinton Oil stock into the Orvis trading account (62-2070) which were delivered to Orvis for sale for the account of a customer.
- 2. In or about April, 1969, the defendant KILDUFF told the other defendants that he estimated the ratio of Orvis' aggregate indebtedness to not capital to be in excess of 30:1. At that time each defendant agreed that everything should be done to keep the firm in business, including the falsification of the books and records of Orvis.
- 3. On or about April 30, 1969, the defendants SLOAN, EUCKLR and KILDUFF with the consent of the other defendants, caused the erroneous posting in the custowers cash account captioned Clinton Oil Company (55-1400) a cash debit of \$797,100.00.
- 4. On or about May 15, 1969, the defendants SLOAN and EILDUFF caused the receipt without cost of 5,000 shares of Clinton Oil stock into the Orvis trading account (62-2070) when in fact the shares were delivered for sale to the firm at a fixed price.

- 5. Fr or about August 10, 1969, the defendents at- 'tonded a 'there) Partners Heeting of Crvis held at the .

 Dev Yerh ethlesia Club in Univ York City.
- the Crvic Trading Account (62-2075) of \$500,000.00 received as advence payment on commissions receivable from Clinton.
- 7. On or about August 28, 1969, the defendants SLOAN, EUCKER and ETEDUTE caused the transfer of securities from a subordinated loan account to the Clinton Oil Account (5-1600).
- 3. On or about August 28, 1969, the defendants SLOAM and ALCHASCH caused the erroneous posting of a sale of 80,000 shares of Clinton Oil for \$830,000.00 from the Orvis Trading and Investment Accounts (62-2075, 62-2000) to the Clinton Oil Pension Fund.
- 9. In or about September, 1969, the defendant SLOAN not with Bick Clinton in Wichita, Ransas.
- 10. On or about October 16, 1969, the defendants SLOAN, ANDERSON, LUCKER, VILLANT and EILDUFF caused the filing of a materially false and incomplete Financial Questionnaire (Ferm X17a-5) by Orvis with the SEC in New York City.
- 11. In or about the first week of December, 1969, the defendant SLOAN caused the mailing of a customers' statement to the Clipton Uil Pension Fund.
- 12. In or about October and November, 1969, the defendent RECKER told an comployee of Crvis to use customers' folly paid securities as colleteral on bank loans obtained by Orvis.

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The Grand Jury Luction d'action

- 1. Orvis Exochers (to., (tovis) was a brokerage firm, a worker of the New York Leach reclarge and foreign Stock Enchange, and was registered as a broker and datler pursuant to Section 15 of the Securities Exchange /ct of 1936, as awaded, and therefore was required by law (17 C.F.R. 240-17a-5), to file for the 1969 Fiscal year a report of financial condition containing the information required by Torm X-17A-5.
- 2. On or about the 16th day of October, 1969, in the Couthern District of Few York, FERGUS M. SLOAN, JR., CARL W. AMDERSON, DORALD LUCEDR, JOHN J. VILLANT, and THOMAS C. KILDDFF, the defendants, unlawfully, wilfully and knowingly did rake, and cause to be rade, statements in an K-17A-5 report of financial condition of Grvis which statements were false and misleading with respect to material facts in that:
 - a) Statements of the trading and investment accounts of Grvis were falsely inflated.
 - b) Statement of the correction of customers' fully paid securities loaned and pledged in error was false.
 - c) Statement of balances in customers' cash accounts was falsely in lated.

MOTION TO DISCUSS INDICTMENT, JANUARY 31, 1975

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF MEN YORK

UNITED STATIS OF AMERICA.

74 Cr. 859 (VK)

FERCUS M. SLOWN, JR., CARL W.

ANDERSCH, DOWALD EUCKER, JOHN J.: DISHISS INDICHERT
VILLANI and THOMAS C. KILDUFF, UNIER BULES 7(c),

Defendants.

NOTICE OF MOTION TO Uniter Rules 7(c), 8(a) : AND 12 AND FIFTH AND SIXTH AMERICATS

SIR:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Jerome J. Londin, sworn to January 31, 1975, and upon the indictment and all of the proceedings heretofore had harein, a motion will be made by the undersigned on behalf of Carl W. Anderson, a defendant herein, on February 10, 1975 at 4:30 p.m., before the Hon. Whitman Knapp, United States District Judge, in Room 618, United States Courthouse, Foley Square, New York, New York, for an order pursuant to Rules 7(c), 8(a) and 12 and the Fifth and Sixth Amendments, dismissing the indictment on the following grounds:

1. Count 1 is duplications, charging multiple conspiracies in one count. Most of the acts and conspiracies set forth therein are barred by the statute of limitations, having occurred more than five years before the return of the indictment herein. Some of the conspiracies are set forth in terms that are vague and indefinite, and in a manner which does not inform the defendant Anderson of the nature and cause of the accusation sufficiently to enable him to prepare his defense and to afford him sufficient protection against being put in jeopardy twice for the same crime. In addition, some of the conspiracies are charged in a manner which is not specific enough to insure that the indictment is that of the grand jury and will not become, by interpolation, the indictment of the prosecutor or of the Court.

- 2. Counts 2 through 7 are barred by the statute of limitations, having occurred more than five years before the return of the indictment herein.
- 3. Count 9 is duplications. Portions of it are barred by the statute of limitations. It is vague and indefinite; it does not inform the defendant Anderson of the nature and cause of the accusation sufficiently to enable him to prepare his defense and to afford him sufficient protection against being put in jeopardy twice for the same crime. In addition, the Court is not specific enough to insure that the indictment is that of the grand jury and will not become,

Motion to Discuss Indictment, January 31, 1975

by interpolation, the indictment of the prosecutor or of the Court.

4. Count 8 is vague and indefinite; it does not inform the defendant Anderson of the nature and cause of the accusation sufficiently to enable him to prepare his defense and to afford him sufficient protection against being put in jeopardy twice for the same crime. In addition, the Court is not specific enough to insure that the indictment is that of the grand jury and will not become, by interpolation, the indictment of the prosecutor or of the Court.

Dated: January 31, 1975

CARRO, SPANEOCK, LONDIN. RODMAN & FASS Attorneys for Defendant Carl W. Anderson

Jerome J. Londin
10 East 40th Street
New York, N. Y. 10016
212-889-3600

TO: HON. PAUL J. CURRAN
United States Attorney for the
Southern District of New York
United States Courthouse
Foley Square
New York, N. Y. 10007

AFFIDAVIT OF JEROME J. LONDIN IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, : 74 Cr. 859 (WK)

FERGUS M. SLOAN, JR., CARL W. : ANDERSON, DONALD EUCKER, JOHN J. VILLANI and THOMAS C. KILDUFF.

AFFIDAVIT

Defendants.

STATE OF NEW YORK) 88.: COUNTY OF NEW YORK)

JEROME J. LONDIN, being duly sworn, deposes and says:

- 1. I am a member of the firm of Carro, Spanbock, Londin, Rodman & Fass, attorneys for the defendant Carl W. Anderson. This affidavit is made in support of the annexed motion to dismiss the indictment under Rules 7(c), 8(a) and 12 and Fifth and Sixth Amendments.
- 2. I have been informed that the indictment was filed on September 10, 1974, and that the Assistant United States Attorney who obtained the indictment resigned on the day it was filed or within a few days thereafter. The indictment gives every evidence of its hurried draftsmanship after an equally hurried presentation of the case to the grand jury. The defects in that indictment which require dismissal of counts 1 through 9 are set forth in the

Affidavit of Jerome J. Londin in Support of Motion annexed motion and in the brief in support of that motion. The indictment on its face violates Rules 7(c) and 8(a) and the Fifth and Sixth Amendments. Substantial portions of the indictment are barred by the statute of limitations. Other portions of the indictment are duplicatous and unconstitutionally

WHEREFORE, deponent respectfully prays that the annexed motion be granted, and the defendant Anderson have such other and further relief as may be just and proper.

JEROME J. LONDIN

Sworn to before me, this 31st day of January, 1975

vague and indefinite.

PETER M. FASS Notary Public, State of New York
No. 31-6242525
Qualified in New York County
Commission Expires March 30, 1976

MOTION TO DISMISS INDICTMENT, MARCH 12, 1975

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, : 74 Cr. 859 (WK)

FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI and THOMAS C. KILDUFF,

NOTICE OF MOTION TO DISMISS INDICTMENT UNDER RULE 12(b)(2)

Defendants.

:

SIR:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Jerome J. Londin, sworn to March 12, 1975, and upon the indictment and all of the proceedings heretofore had herein, a motion will be submitted on behalf of Carl W. Anderson, a defendant herein, on March 12, 1975, to the Hon. Whitman Knapp, United States District Judge, at the United States Courthouse, Foley Square, New York, New York, for an order pursuant to Rule 12(b)(2), dismissing Count 9 of the indictment and that portion of Count 1 which purports to allege a conspiracy to violate Rule 8c-1 (Count 1, paragraphs 2 and 7(h)).

Dated: New York, N. Y. March 12, 1975

CARRO, SPANEOCK, LONDIN, RODMAN & FASS Attorneys for Defendant Carl W. Anderson

1, .. Jerome J. Londin 10 East 40th Street New York, N. Y. 10016 212-889-3600

TO: HON. PAUL J. CURRAN United States Attorney for the Southern District of New York United States Courthouse Foley Square New York, N. Y. 10007

AFFIDAVIT OF JEROME J. LONDIN IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, : 74 Cr. 859 (WK)

FERGUS M. SLOAN, JR., CARL W.

AFFIDAVIT

ANDERSON, DONALD EUCKER, JOHN J. VILLANI and THOMAS C. KILDUFF,

Defendants.

STATE OF NEW YORK)

COUNTY OF NEW YORK)

JEROME J. LONDIN, being duly sworn, deposes and says:

:

- 1. I am a member of the firm of Carro, Spanbock, Londin, Rodman & Fass, attorneys for the defendant Carl W. Anderson. This affidavit is made in support of the annexed motion to dismiss Count 9 and that part of Count 1 which purports to allege a conspiracy to violate Rule 8c-1 (see 17 C.F.R. \$ 240.8c-1).
- 2. The indictment fails to allege an essential element of the crime purported to be charged therein, namely, the pledge of customers' fully paid for securities in a sum in excess of the aggregate indebtedness of all customers of Orvis.

WHEREFORE, deponent respectfully prays that the annexed motion be granted, and that the defendant Andersor Affidavit of Jerome J. Londin in Support of Motion have such other and further relief as may be just and proper.

JEROME J. LONDIN

Sworn to before me, this 12th day of March, 1975

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Commission Expires Murch 30, 1972
Conflict of the County County
That 11-605 2250
That You will be county
The County State of the York
The State of the York

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

DESTRICT COURT	* X		
UNITED STATES OF ASSERICA,	:		
- v ~	:	74 Cr. 859	(XXI)
PRESUS M. SLOAM, JR., CAVE W. ALDERCOM, BOYALD FECTOR, JOHN J.	:		
VILLANI and THOLDS C. KLIDGEF,	: .	•	
pefendants.	:		
	- 5		

MENORMHERM OF LAW IN SUFFORT OF MOTION TO DISABLE INDICTIONAL MODES 7(c), S(a) AND 12 AND FILTH AND SIXIS A LETYLLES

This marerandum of law is embaltical in support of the annexed rotion to dismiss the indictment under Rules 7(c), 8(s) and 12 and Fifth and Sinth Amendments.

COURT ONE

Count 1, the contpiracy count, charges a comspiracy to violate five sections of the Securities Enchange Act of 1934 and five SEC rules and one regulation of the Yederal Reserve System. Although purporting to allege one overall conspiracy it is obvious that the

Memorandum in Support of Motion to Dismiss indictment has strong together in one count separate complicates in each of which the participation of some, but not all, of the defendants in set forth. The means by which the indictment does this is to name some but not all of the defendants as participants in schools to violate some but not all of the statutes, rules and regulations named, and then to add that the remaining defendants in some unspecified way "consent" to each of the schools or to the unlawful conduct of others. The indictment's vague and indefinite reference to the "consent" of Anderson is insufficient to allege his manbership in the conspiracy.

The trial of this case will squarely present the problem reised by Kotteshos v. United States, 328 U.S. 750 (1946).

A defendant has a right not to be tried en masse for the conglomeration of distinct and separate offenses consisted by others. Indeed, Rule 8(a) requires that there be "a separate count for each offense." Mereover, since a conspiracy to violate, inter alia, five different rules under the Securities Exchange Act of 1934 is alleged, and

the defendant Anderson way have been ignorant of some or all of these reles, no joil sentence could be imposed under Section 70ff, and, secondingly, no joil continue may be imposed under the provisions of the compliancy statute, 18 U.S.C. 371. Under a general verdict of guilty, how is the Court to determine the statute or rule or regulation under which the jury convicted?

Most of the sets and conspiracies set forth in count 1 are barred by the statute of limitations, having occurred more than five years before the return of the indictment herein on Captanber 10, 1974. What the prosecution has done is to lump together all acts indiscriminately by charging one overall conspiracy.

As to the defendant Anderson these various schemes are charged in a vague and indefinite manner which does not inform him of the nature and cause of the accusation sufficiently to enable him to prepare his defense and to afford him sufficient protection sgainst being put in jeopardy twice for the same crime. Contracy to the requirement of Rule 7(c) the conspiracy count is not "a plain,

Memorandum in Support of Motion to Dismiss

4.

facts constituting the effence charged." Count 1 is violative of the defendant Anderson's right under the Sinth Ananoment to be informed of the nature and cause of the securation in order to prepare his defense, and of his right under the Fifth Amendment to be protected against double joopardy. Nor is the indictment sufficiently specific to insure that, under the Fifth Amendment, the indictment as to Anderson is that of the grand jury, and that it does not become, by interpolation, the indictment of the prosecutor or of the Court. See Van Liew v. United States, 321 F.2d 664 (5th Cir. 1963).

COUNTS THO THROUGH SEVEN

counts 2 through 7 allege the making of false entries on six different dates, all of which occurred more than five years prior to the return of the indictment.

Accordingly, these counts are barred by the statute of limitations.

COUNT HIRE

Count 9 is duplications and barred by the statute of limitations. In one count is charges unspecified

Memorandum in Support of Motion to Dismiss
5.

violations from August 1, 1969 (beyond the period of limitations) to June 3, 1970 of the statute prohibiting the hypothesation of custo was fully paid for securities.

Contrary to the requirement of Rule 7(c), count

9 is not "a plain, concise and definite written statement

of the essential facts constituting the offcase charged.

It is also violative of Rule 8(a), which requires that

there be "a separate count for each offense."

Moreover, it also violates the defendant Ancerson's Sixth Amendment right to be informed of the nature and cause of the accusation in order to prepare his defense, and his Pifth Amendment right to be protected against being put in jeopardy twice for the same offense. In addition, containing no specificity whatsoever, count 9 cannot assure that, under the Fifth Amendment, it is the indictment of the grand jury rather than that of the prosecutor or the Court as determined by what proof is offered and received in support of it. See Russell v. United States, 369 U.S. 749 (1962); United States v. Fanzavecchia, 421 F.2d 440 (5th Cir. 1970), cert. denied, 404 U.S. 966 (1971); Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969); Van Lieu v. United States, 321 F.2d 664

Memorandum in Support of Motion to Dismiss

6.

(5th Cir. 1953). See also <u>United States v. Fileldra Oil</u>

<u>Conserv of Teras</u>, 427 F.2d 559, 972 (10th Cir. 1970);

<u>United States v. Silverson</u>, 430 F.2d 106, 110 (2d Cir. 1970).

COUNT EXCENT

contained enterially false and misleading statements. Nowever, the allegations as to the allegadly false material
are vague and indefinite. The count contains marely a general
reference to three different categories of information,
without any indication by the grand jury as to: (a) which
entries in the trading and investment accounts were falsely
inflated, and the amounts by which they were inflated; (b)
what the falsity was with respect to customers' fully paid
securities that were losned and pledged; and (c) which talances
in customers' cash accounts were falsely inflated, and the
emports by which they were inflated.

Dated: Jenuary 31, 1975

Respectfully submitted,

CARRO, SPANECCK, LONDIN, RODMAN & FASS Attorneys for Defendant Carl W. Anderson 10 East 40th Street New York, N. Y. 10016 (212) 892-3600

Jerone J. Londin, Of counsel. SUPPLEMENTARY MAN URANDUM IN SUPPORT OF MOTION TO DISMISS

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v - : 74 Cr. 859 (WK)

FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI, THOMAS C. KILDUFF,

Defendants.

SUPPLEMENTARY MEMORANDUM OF LAW SUBMITTED ON BEHALF OF DEFENDANT CARL W. ANDERSON, IN SUPPORT OF HIS MOTION TO DISMISS COUNT 9 OF THE INDICTMENT

On January 31, 1975, defendant Anderson moved, <u>interalia</u>, to dismiss Count 9 of the indictment because it is duplicitous, portions of it are barred by the statute of limitations, it is vague and indefinite and does not inform the defendant of the nature and cause of the accusation sufficiently to enable him to prepare his defense and to protect him against double jeopardy, and is not specific enough to insure that the indictment is that of the grand jury and will not become, by interpretation, the indictment of the prosecutor or of the Court. Evidently, prior to the oral argument on March 4, 1975, the Court denied the said motion, but agreed to hear argument and to entertain it, in effect, as a motion for reargument. This memorandum is submitted to augment the papers heretofore filed.

The indictment herein was returned on September 10, 1974.

Count 9 thereof charges the following alleged crimes:

- "1. From August 1, 1969 to June 3, 1970, Orvis
 Brothers & Co., was a brokerage firm, a member of the
 New York Securities and [sic]* Exchange, and a registered
 broker and dealer pursuant to Section 15 of the Securities and [sic]** Exchange Act of 1934, and, as such, was
 subject to the provisions of Rule 8c-1 (17 C.F.R.
 Section 240.8c-1), a rule prescribed by the S.E.C. for
 the protection of investors.
- "2. From on or about the 1st day of August, 1969 up to and including the 3rd day of June, 1970, in the Southern District of New York, FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI, and THOMAS C. KILDUFF, the defendants, unlawfully, wilfully and knowingly, did, directly and indirectly, hypothecate and arrange for and permit the continued hypothecation of fully paid for securities carried for the account of customers of Orvis under circumstances that permitted such securities to be hypothecated and subjected to liens and claims of pledges in amounts up to \$7,000,000.00.

(Title 15, United States Code, Sections 78h and 78ff and 17 C.F.R. Section 240.8c-1; Title 18, United States Code, Section 2.)"

Section 8 of the Securities Exchange Act, 15 U.S.C.

- § 78h, provides in pertinent part:
 - "Sec. 8. It shall be unlawful for any member of a national securities exchange, or any broker or dealer who transacts a business in securities through the medium of any such member, directly or indirectly---
 - (c) In contravention of such rules and regulations as the Commission shall prescribe for the protection of investors to hypothecate or arrange for the hypothecation of any securities carried for the account of any customer under circumstances (1) that will permit the commingling of his securities without his written consent with the securities of any other customer, (2) that will permit such securities to be commingled with the securities of any person other than a bona fide customer, or (3) that will permit such securities to be hypothecated, or subjected to any lien or claim of the pledgee, for a sum in excess of the aggregate indebtedness of such customers in respect of such securities."

^{*}Presumably "New York Stock Exchange". **The Act is entitled "Securities Exchange Act of 1934", 15 U.S.C. § 78a.

Supplementary Memorandum in Support of Motion to Dismiss

Pursuant to the authority granted by the statute, the

Commission adopted Rule 8c-1, 17 CFR § 240.8c-1, subdivision (a)

of which contains the prohibitions of the Rule. Subparagraphs

(1) and (2) of Rule 8c-1(a) are not pertinent herein because they

prohibit the "commingling" of customers' securities, a violation

not explicitly charged in the indictment. Pule 8c-1(a) (3), which

does apply, provides in pertinent part:

"Rule 8c-1. Hypothecation of Customers' Securities.

(a) General Provisions. --- No member of a national securities exchange, . . . shall, directly or indirectly, hypothecate or arrange for or permit the continued hypothecation of any securities carried for the account of any customer under circumstances ---

(3) that will permit securities carried for the account of customers to be hypothecated, or subject to any lien or liens or claim or claims of the pledgee or pledgees, for a sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts; . . .

Count 9 of the indictment herein is fatally defective in two material particulars:

(a) By charging both the crime of "hypothecating"
securities and the crime of "permit[ting] the continued hypothecation of fully paid for securities", the indictment fails to make clear whether the grand jury intended to accuse defendant Anderson of personally hypothecating securities at a time within the period of limitations; or of personally hypothecating securities at times for which prosecution would otherwise be barred, on a "continuing-violation" theory; or of not having personally hypothecated securities, but having thereafter learned of hypothe-

Supplementary Memorandum in Support of Motion to Dismiss cations by others, by his silence having "permit[ted] the continued hypothecation".

- (b) The indictment omits an essential element of the crime in that it ignores the fact that both the statute and the regulation forbid a "member of a national securities exchange" to hypothecate fully paid for securities of its customers. The member of the national securities exchange was Orvis Brothers & Co., which is not named as a defendant in Count 9. Nor does Count 9 of the indictment accuse defendant Anderson, as a putative "controlling person" of Orvis under section 20(b) of the Act, of having caused Orvis to commit such alleged violations. For all that appears, the grand jury might have voted the indictment in the erroneous belief that defendant Anderson violated section 8(c) solely because he was a partner of Orvis.
 - (a) The indictment is deficient in failing to differentiate between the crime of "hypothecating" and the alleged crime of "permit[ting] the continued hypothecation" of securities

Setting the regulation alongside the statute, it is evident that while the statute forbids a member of a securities exchange "to hypothecate or arrange for the hypothecation" of securities under terms prescribed thereby, it nowhere contains the language of Rule 8c-1(a) which also prohibits such exchange member to "permit the continued hypothecation of any securities" in violation of the regulation. The indictment charges, inter alia, a violation consisting of having "permit[ted] the continued hypothecation" of securities, which is found in the regulation,

Supplementary Memorandum in Support of Motion to Dismiss
but not in the statute. Since we are dealing with alleged violations which the indictment charges commenced no earlier than
August 1, 1969 and continued to June 3, 1970, and since the
statute of limitations precludes prosecution of any violations
occurring prior to September 10, 1969, the allegation of Count 9,
that defendant Anderson violated the statute and the rule when he
"permit[ted] the continued hypothecation" is constitutionally
defective, on authority of this Court's Memorandum and Order,
dated February 12, 1975, dismissing Counts 2 through 7 of the
present indictment (pp. 5 through 8); and see, Toussie v. United
States, 397 U.S. 112 (1970).

The plenary crime charged, in the language of the statute, is the alleged hypothecation of the securities, and, to paraphrase this Court (p. 7), "there can be no question that the government could have commenced prosecution the day after the [hypothecations] were made." Nor would the act prohibited by the statute be any less a crime if three days after it was committed the wrongdoer "unhypothecated" the securities. By framing the indictment in the language of the Commission's regulation, which prohibits not merely the hypothecation of securities, but also the "permit[ting] the continued hypothecation", the Government, without any statutory authority, seeks to strip a defendant of the defense of limitations applicable to specific "hypothecations" with which he might be charged and which have become time-barred.

In <u>Toussie</u> v. <u>United States</u>, <u>supra</u>, 397 U.S. at 114-15, the Supreme Court addressed itself to the limitations problem:

*In deciding when the statute of limitations begins to run in a given case several considerations guide our decision. The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punis ment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before 'the principle that criminal limitations statutes are "to be liberally interpreted in favor of repose," . . . We have also said that '[s]tatutes of limitations normally begin to run when the crime is complete.' . . . And Congress has declared a policy that the statute of limitations should not be extended '[e]xcept as otherwise expressly provided by law.' 18 USC § 3282. These principles indicate that the doctrine of continuing offenses should be applied in only limited circumstances since, as the Court of Appeals correctly observed in this case, '[t]he tension between the purpose of a statute of limitations and the continuing offense coctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term. "

When Congress, in section 8(c) of the Act, authorized the Securities and Exchange Commission to prescribe rules thereunder, it limited the rule-making power to "such rules and regulations as the Commission shall prescribe for the protection of investors". It gave the Commission no power or authority to strip prospective defendants of the defense of limitations, and its silence must be read strictly against the implication of such a power. In Toussie the Court said, 397 U.S. at 120:

"Since there is no specific evidence that Congress actually was aware of this limitations question when it acted---whatever weight such evidence might deserve--- and since we are reluctant to imply a continuing offense except in limited circumstances, we conclude that any argument based on congressional silence is stronger in favor of not construing this Act as incorporating a continuing-offense theory."

charged in Count 9 of the indictment herein would strip a defendant who hypothecated securities of his limitations protections. Even more perversely, it would create a wholly separate crime in the case of an individual who had not himself participated in the hypothecation of securities, but who thereafter stumbled upon the fact of such hypothecation. If the "reluctance to imply a continuing offense" theory to an actor-defendant is not extended to such non-actor defendants, the result could be that one who hypothecated securities is immune from prosecution by reason of limitations, while one who himself only earned of the hypothecation thereafter and did nothing, even though it was then too late to protect the customers' securities, would be subject to prosecution.

Anderson learned of the hypothecation at a time when his action could have prevented injury to investors, and that he wrongfully failed to act, an argument could be made that the rule was necessary "for the protection of investors." But the indictment makes no allegation that Anderson's knowledge could have prevented injury, and the absence of such allegation is fatal. The alleged crime of "permit[ting] the continued hypothecation" is not like a charge of "conspiracy" (and none is charged in Count 9). As the Court said in Toussie, supra, 397 U.S. at 122, "It is in the nature of a conspiracy that each day's acts bring a renewed threat of the substantive evil Congress sought to prevent." Here the evil was the hypothecation of securities. Absent an allegation

Supplementary Memorandum in Support of Motion to Dismiss
that Anderson's "permit[ting] the continued hypothecation" itself
injured the defrauded investors, the regulation is improperly
applied to him, and the indictment defective, because we have
absolutely no means of learning what factors the grand jury took
into account in voting the indictment.

Nor is the defect one which may be cured by resort to a bill of particulars. The most that a bill of particulars will achieve is to provide defendant with the United States Attorney's theory of what the grand jury found. It will not supply the absence of explicit charging paragraphs by the grand jury. The defendant's constitutional right under the Fifth and Sixth Amendments to the Constitution is to be tried only on crimes of which he has been accused by a grand jury. That constitutional right is not satisfied by a grand jury's skeletal paraphrases of a statute (or a rule), as to which the prosecutor is required to supply the flesh.

In <u>Russell</u> v. <u>United States</u>, 369 U.S. 749, 765 (1962), Justice Stewart said for the Court:

"'It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,---it must descend to particulars." United States v Cruikshank, 92 US 542, 558, 23 L ed 588, 593. An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him * * is defective, although it may follow the language of the statute.' United States v Simmons, 96 US 360, 362, 24 L ed 819, 820. 'In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to

constitute the offence intended to be punished; * * *'
United States v Carll, 105 US 611, 612, 26 L ed 1135.
'Undoubtedly the language of the statute may be used in
the general description of an offence, but it must be
accompanied with such a statement of the facts and
circumstances as will inform the accused of the specific
offence, coming under the general description, with
which he is charged.' . . " [Citations omitted].

Turning to the utility of bills of particulars to supply such omissions in the indictment proper, the Court held, <u>id</u>., pp. 769-71, that they would not suffice:

"It is argued that any deficiency in the indictments in these cases could have been cured by bills of particulars. But it is a settled rule that a bill of particulars cannot save an invalid indictment. . . To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. . . .

"This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. . . . 'If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed. * * * Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution placed upon the power of the court, in regard to the prerequisite of an indictment,

in reality no longer exists.' Ex parte Bain, supra (121 US at 10, 13). We reaffirmed this rule only recently, pointing out that 'The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.' Stirone v. United States, supra (361 US at 218)."

We thus have a count of an indictment which in fact charges two potentially different crimes: one of hypothecating or permitting the hypothecation of securities (following the language of the statute), as to which serious questions of limitations immediately appear. We also have a charged crime (tracking only the language of the regulation) which would make the defendant liable for violations which are themselves time-barred, on a theory which this Court itself has repudiated in this very proceedings. It is not for the prosecuting attorney or even for the Court to say whether the crime charged in Count 9 by the grand jury is based wholly upon the second, impermissible, theory; wholly upon the first, permissible, theory; or on some unspecified combination of both. For ought that appears, the grand jury found no evidence whatever that defendant Anderson himself "hypothecated" or "permitted the hypothecation" of securities of Orvis's customers during any time after September 10, 1969. It might well have concluded, on what evidence we do not know, that after that date defendant Anderson learned of the unlawful "hypothecation" of securities by others, and himself failed, during the post- September 10, 1969 period, to act, thereby "permit[ting] the continued hypothecation" of the securities. The vagueness of Count 9 in these respects makes it constitutionally inadequate, and requires that it be dismissed.

(b) Count 9 of the indictment is deficient in failing to connect defendant Anderson with a crime which under the statute could be perpetrated only by Orvis Brothers & Co.

As we have heretofore noted, the statute (and the regulation as well) make it unlawful "for any member of a national securities exchange" to hypothecate securities of customers of the member. Orvis Brothers was the member of the national securities exchange, and it is the securities of its customers which were allegedly hypothecated. Orvis is not named in Count 9 of the indictment. All the defendants therein named are individuals formerly connected with Orvis, and Count 9 charges them with a crime which under the statute could be committed only by Orvis.

If it was the sense or the intent of the grand jury that sufficient evidence had been presented to it to enable it to charge named defendants with criminal responsibility for the acts of Orvis, or to charge that Orvis committed those acts through named defendants, it has conspicuously failed to do so in Count 9, and, as the authorities cited in the preceding subhead of this memorandum make plain, defendants are not required, and the Court is not permitted, to speculate as to what the grand jury may have intended when it voted the indictment.

Moreover, if it was intended in Count 9 to charge defendant Anderson with indirect, derivative, "control" or "aiding and abetting" liability under the Securities Exchange Act of 1934, the indictment in this respect is woefully inadequate under the tests for such liability enunciated in a number of recent

Supplementary Memorandum in Support of Motion to Dismiss decisions. See, e.g., Gordon v. Burr, 506 F.2d 1080 (2d Cir. 1974); Hochfelder v. Midwest Stock Exchange, 503 F.2d 364 (7th Cir. 1974); SEC v. Coffey, 493 F.2d 13C4, 1315 (6th Cir. 1974); Lanza v. Drexel & Co., 479 F.2d 1277, 1299 (2d Cir. en banc 1973). These cases all make clear that it is not sufficient to establish personal liability (civil or criminal) of an individual defendant merely by pointing to a violation of the Exchange Act ' by a person or entity with which the defendant is affiliated, (even where the defendant is a "control" person of the party violating the Exchange Act), pointing to the fact of "control", and leaving the matter in that posture. The Exchange Act has no provision for such automatic liability except in some instances which approximate the common law doctrine of respondeat superior, which is inapplicable here. Rather, as the cited cases all make plain, before such derivative or secondary liability may be brought home to a defendant, there must be a showing of some knowing or conscious conduct by the defendant charged with such liability.

In Gordon v. Burr, supra, 506 F.2d 1080, 1085, the Second Circuit reversed a judgment entered by Judge Bauman on the erroneous theory that the standard for imposing "controlling person liability" under section 20 of the Exchange Act, 15 U.S.C. § 78t, "is a far lower one" than the standard for imposing direct liability under section 10(b) of the Act. The Court reversed because "We fail to find in the record support for a finding that P.A.W. had knowledge of the fraudulent representations or in any meaningful sense culpably participated in them."

In a similar vein, the Seventh Circuit in <u>Hochfelder</u>,

<u>supra</u>, 503 F,2d at 374, held that such instant liability could

not be achieved by resort to the notion of "aiding and abetting":

"In invoking such a rule, however, we would not go so far as to charge a party with aiding and abetting who somehow unwittingly facilitated the wrongful acts of another. Rather, to invoke such a rule investors must show that the party charged with aiding and abetting had knowledge of or, but for a breach of duty of inquiry, should have had knowledge of the fraud, and that possessing such knowledge the party failed to act due to an improper motive or breach of a duty of disclosure."

In <u>SEC</u> v. <u>Coffey</u>, <u>supra</u>, 493 F.2d at 1317-18, the Sixth Circuit went even further. Having found that defendant King had no personal knowledge of misrepresentations made to the State of Ohio by his subordinates (<u>id</u>., at 1316), the Court held he could not be held secondarily liable:

"Nor do we find any evidence that King knowingly assisted any deception which Crofters' personnel may have perpetrated on State officials. Inaction may be a form of assistance in certain cases, but only where it is shown that the silence of the accused aider and abettor was consciously intended to aid the securities law violation.

"Normally, intent to commit a securities law violation does not require independent proof. . . Knowledge that a securities law violation would be furthered by one's silence or inaction, however, must be proven by reliable and probative evidence, . . . though the evidence may be circumstantial as well as 'direct.' . . . Were such proof not required, a person who is not primarily liable for a violation could yet be held personally liable for the violation, even though he or she was unaware of the need to disclose information withheld by those primarily liable. The result would be to impose liability for an innocent omission, for non-culpable inaction. This would stretch the application of Rule 10b-5 beyond its statutory limits, since section 10b of the 1934 Act does not impose liability for innocent acts but only for acts of fraud or deceit."

Turning to the potential liability under section 20 of the 1934 Act, the Sixth Circuit denied its applicability on either of two theories, each fatal to the wrongdoing charged against defendant Anderson in Count 9 of the indictment. The Court held that section 20(a) is not available to the Commission or in a criminal prosecution; and it held that section 20(b) requires proof of "knowing use of a controlled person by a controlling person", 493 F.2d 1318:

"Even had proper findings been made, however, we hold that section 20(a) of the 1934 Act may not be relied upon by the SEC in an injunctive enforcement action. Section 20(b) of the 1934 Act provides for the unlawful actions of controlling persons, and the SEC may only seek injunctions against unlawful actions. See section 20(b) of the 1933 Act, 15 U.S.C. § 77t(b); section 21(e) of the 1934 Act, 15 U.S.C. § 78u(e). Section 20(a) of the 1934 Act makes a controlling person liable 'to any person to whom such controlled person is liable.' As a matter of legislative interpretation, we hold that the SEC is not a person under section 20(a), since section 20(a) was meant to specify the liability of controlling persons to private persons suing to vindicate their interests. Section 20(b) sets forth the standard of lawfulness to which a controlling person must confirm, on penalty of liability in injunction to the SEC or criminal prosecution.

"Under section 20(b), there must be shown to have been knowing use of a controlled person by a controlling person before a controlling person comes within its ambit. Without such a restriction, every link in a chain of command would be personally criminally and civilly liable for the violations of inferior corporate agents. This was not the congressional intent in enacting section 20(b). As we concluded above, King has not been shown to have had any knowledge of Crofter's personnel's dealings with either the State of Chio or NCO, nor can we find a scintilla of proof that he 'used,' directly or indirectly, Crofters' personnel to carry out a violation."

It is germane to observe that the United States Attorney's authority to prosecute an alleged violation of the Securities Exchange

Act springs from the identical section 21(e), 15 U.S.C. § 78u(e), as vests the Securities and Exchange Commission with the power to seek an injunction. The last sentence of section 21(e) authorizes the Commission to "transmit such evidence as may be available concerning such acts and practices [which constitute or will constitute a violation] to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter." Thus, what the Sixth Circuit said in SEC v.

Coffey, supra, about the showing which the Commission is required to make to procure an injunction on the basis of secondary liability applies a fortiori to a prosecution under the Act.

We are not here concerned with whether the Government has evidence sufficient, under a properly drawn indictment, to convict defendant Anderson under section 20(b) of the Act by reason of the acts of Orvis or of other unspecified persons. The issue is the sufficiency of the indictment itself. The foregoing authorities demonstrate that the deficiencies of the indictment cannot be saved by resort to secondary or derivative liability theories.

CONCLUSION

COUNT 9 OF THE INDICTMENT, AS DRAWN, IS DEFICIENT UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION, IS VAGUE AND INSUFFICIENT UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE, AND MUST BE DISMISSED.

Respectfully submitted,

CARRO, SPANBOCK, LONDIN, RODMAN & FASS Attorneys for defendant Carl W. Anderson

JEROME J. LONDIN, REGINALD LEO DUFF, Of Counsel.

ADDITIONAL MEMORANDUM IN SUPPORT OF MOTION TO LISMISS

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

74 Cr. 859 (MK)

FERGUS M. SLOAN, JR., CARL W. ANDERSON, DOMALD EUCKER, JOHN J. VILLANI and THOMAS C. KILDUFF,

Defendants.

ADDITIONAL MEMORARDUM OF LAW ON BEHALF OF DEFENDANT ANDERSON IN SUPPORT OF MOTION TO DISMISS COUNT 9

Preliminary Statement

This additional memorandum of law is submitted in support of defendant Anderson's pending motion to dismiss Count 9 of the indictment on the additional ground that, pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure, Count 9 fails to charge an offense. For the reasons stated herein, defendant Anderson also moves to strike from Count 1 -- the conspiracy count -- that portion which charges a conspiracy to violate Title 15, United

Additional Memorandum in Support of Motion to Dismiss

States Code, Section 78h and Rule Sc-1 propulgated thereunder (17 C.F.R. § 240.3c-1).

The Indictment

In pertinent part, Count 9 alleges that:

"... the defendants, unlawfully, wilfully and knowingly, did, directly and indirectly, hypothecate and arrange for and permit the continued hypothecation of fully paid for securities carried for the account of customers of Oivis under circumstances that permitted such securities to be hypothecated and subjected to liens and claims of pledges in amounts up to \$7,000,000.00."

The Statute

In pertinent part, Title 15, United States Code, Section 78h provides:

"It shall be unlawful for any member of a national securities exchange, or any broker or dealer who transacts a business in securities through the medium of any such member, directly or indirectly --

"(c) In contravention of such rules and regulations as the Commission shall prescribe for the protection of investors to hypothecate or arrange for the hypothecation of any securities carried for the account of any customer under circumstances . . . (3) that will permit such securities to be hypothecated, or subjected to any lien or claim of the

Additional Memorandum in Support of Motion to Dismiss 3.

pledgee, for a sum in excess of the aggregate indebtedness of such customers in respect of such securities."

The SEC Rule

Pursuant to its rule making power, the SEC promulgated Rule 8c-1 (17 C.F.R. § 240.8c-1), which reads in pertinent part:

"(a) General Provisions. - No member of a national securities exchange, and no broker or dealer who transacts a business in securities through the medium of any such member shall, directly or indirectly, hypothecate or arrange for or permit the continued hypothecation of any securities carried for the account of any customer under circumstances --

* * *

"(3) that will permit securities carried for the account of customers to be hypothecated, or subjected to any lien or liens or claims of the pledgee or pledgees, for a sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts;"

Argument

The statute permits the SEC to prescribe rules and regulations dealing with the hypothecation of securities of customers "for a sum in excess of the aggregate indebtedness of such customers in respect of such securities." However,

Additional Memorandum in Support of Motion to Dismiss 4.

Fule &c-1 forbids the hypothecations of "securities carried for the account of customers" . . . "for a sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts." In this regard, the rule whose violation is made a crime is far narrower than the statuts -- that is, it permits hypothecation to a far greater extent than Section 70h. While Section 78h authorizes the SEC to formulate a rule prohibiting the hypothecation of customers' fully paid for securities, that is not what the SEC has done in Rule 8c-1, which by its very terms permits the hypothecation of customers' securities in an amount which does not exceed the aggregate indebtedness of all customers in respect of securities carried for their accounts.

Howhere in Count 9 is it alleged by the grand jury that the hypothecation was "for a sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts." While the indictment alleges that the hypothecated securities were "fully paid for", the grand jury did not allege that the amount of the lien exceeded the eggregate indebtedness of the customers whose securities were pledged, let alone (as required by the rule) that it exceeded

Additional Memorandum in Support of Motion to Dismiss 5.

the aggregate indebtedness of all customers of Orvis. The conspiracy count suffers from the same infirmity. (See paragraphs 2 and 7(h) of Count 1.)

CONCLUSION

Count 9 fails to allege a violation of Rule Sc-1, and Count 1 fails to allege a conspiracy to violate that rule. Count 9 should be dismissed as should the related conspiracy charges in Count 1.

Respectfully submitted,

CARRO, SPANBOCK, LOUDIN,
RODIAN & FASS
Attorneys for Defendant Anderson

Jerome J. Londin, Of counsel.

CHARGE AND SUPPLEMENTARY INSTRUCTIONS

meb-1

3009

CHARGE OF THE COURT

(Knapp, D.J.)

Ladies and gentlemen, as a preliminary matter, you have heard various witnesses cautioned they should keep their voice up because there are bad acoustics in this room.

Well, the same applies to me, and I would very much appreciate it if at any time during my charge any of you think I am dropping my voice and you can't hear, that you will speak up and say so, and I would appreciate it also if counsel have any idea that I am dropping my voice, that any juror can't hear, I would very much appreciate being interrupted with a comment to that effect.

Now, in this charge, I am firstly going to briefly refer to the issues and then I am going to outline the general principles which the law has developed for your guidance in dealing with those issues, and then I am going to discuss with you the specific crimes which are set forth in the indictment.

What then are the basic issugs? As I have indicated from time to time they are two-fold: (1) Was there a conspiracy between the defendants not on trial, namely, Fergus Sloan and Donald Eucker and Thomas Kilduff,

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CHARGE OF THE COURT

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to file false reports with the Securities and Exchance

Commission and to keep false records to facilitate such

false filings; and if so, (2), were the defendants on trial,

Carl W.Anderson and John J. Villani, or either of them,

wilful and knowing participants in that conspiracy?

of course, unless the answer to the first question is yes, you would never have to consider the second.

As I have indicated from time to time, much of the evidence relating to the first question has no direct bearing on these defendants. Also, a great deal of the evidence bearing on the second question does not concern any conduct claimed to be criminal or even wrongful, but was admitted only to show the state of the defendants' minds or the extent of their knowledge at some time claimed to have been relevant by one or the other of the parties.

What then are the rules which the law provides for your guidance in resolving these questions? It is in the first place, as I have told you before, it is you who must weigh the facts. Nothing that I may say about the facts or that you may conceive that I may think about them has any relevance whatever.

Now, it may surprise you to know that I don't have to tell you that if I don't want to. Under Federal law, I have the power, if I wish to exercise it, to tell you

exactly what I think about the facts, and what I think about the credibility of various witnesses, just so long as I make it clear to you that you are not bound by my views on this subject.

Now, why do I tell you that I have the power to do that if I don't propose to exercise it? Simply for this reason: I want you to thoroughly understand that it is my profound conviction that the jury system only works if indeed the jury totally disregards anything that they may think the Judge feels about the facts.

So, I just want you to realize that I am not telling you this to take care of some formality I have to meet. I am telling it to you because it is my profound conviction that unless you follow that particular instruction, justice may not be done in this case.

As finders of the facts, you will of course be judges of the credibility of the witnesses. There is no mystery about how you judge the credibility of witnesses.

Every day in your life you have occasion to judge the credibility of people with whom you come into contact.

Members of your family, your friends, business associates, competitors, everybody who speaks to you wants you to believe what he or she says.

And in the course of your daily existence you

develop certain criteria or antenna by which you judge the weight that you will put on what people are saying to you.

Now, the theory of the jury system is that it is better to have judgments of this kind made by twelve persons rather than one person.

After all, if any one person has to make a decision as to the credibility of these witnesses, he or she would have only one set of criteria, one set of life experiences, his or her own, to go by.

The jury, on the other hand, has twelve such sets and the law says, and I agree with it, that a sounder result is reached if the twelve of you pool your common experiences in making these decisions. Of course that only works if you do what the law contemplates, namely, discuss the matter with each other with open minds so that each of you can get the benefit of the experience and judgments of the others.

Of course, incidental to your function in this regard is the rule that your recollection of the facts controls. What I may remember or counsel may remember is wholly immaterial. It is your recollection, and if you have any question about it that seems important to you, you can have the stenographer read back pertinent parts of the

testimony.

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Even then if you disagree with what the stenographer reads back, your recollection must control.

We are all fallible. You are fallible too, but the law places the responsibility on you, and if your recollection is different from what the stenographer puts down, you have just got to assume that the stenographer made a mistake.

As I say, we are all fallible but the law places the responsibility on you and you must make the decision.

Now the law does have certain guidelines. One is that you are entitled to take into account the interest any witness may have in the outcome of this action.

To start off, a defendant obviously has an interest. He wants an acquittal, and that is his interest. The defendants on the other hand claim that various of the Government witnesses have motives to falsify -- to some of which claims I shall refer later -- and that you should regard them as interested witnesses.

The point is that it is for you to say whether and to what extent any witness has an interest in the outcome of the case, and, if so, whether and to what extent such interest has influenced his or her testimony before you.

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out of hand because he or she may be interested, but you consider the extent of such interest and decide what effect, if any, it had on the testimony.

Isn't that what you do in everyday life? Most people who talk to you have an interest in having you believe what they say. Otherwise, by and large they wouldn't bother to say it. And in everyday life you take their interest into account in evaluating what they tell you, and that is precisely what you do here.

With respect to Kilduff, there is a related consideration which comes into play. According to his own testimony, Mr. Kilduff is guilty of the very crimes charged against these defendants.

The law calls such a person an accomplice. The law says you are entitled to act on the testimony of such a person, but that you must subject it to special scrutiny. That is, as I say, common sense.

Obviously any person subject to prosecution for crime may either have or think he has an interest in ingratiating himself with the Government by testifying on the Government's behalf.

Obviously, it is more comfortable to be on the witness stand than in a defendant's box.

Therefore, the law says, and it is plain common

sense, that you should take those factors into account when weighing the testimony of a witness.

But the law also says if, after having taken those factors into account, you come to the conclusion that the witness has given truthful, i.e. factually accurate testimony, you may act upon it exactly as you would upon that of any other witness.

As you can see the basic reason an accomplice's testimony should be scrutinized is the possibility which the law recognizes that an accomplice might be tempted to color his testimony in the Government's favor in order to win the Government's good grace.

Somewhat similar considerations may apply to any witness who may have been shown to be subject to Government investigation for any wrongdoing even if not connected with the present case.

So far as I can recollect this could apply to (Christos. Netelkos, who has yet to start serving a sentence imposed by Judge Lasker of this Court, and to Messrs. Clinton and Gamelson, who told you that they were under investigation for possible income tax violations.

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The ultimate point is that with such witnesses, as with any others, it is your responsibility to consider any hope of reward they may harbor in their breast or any pressure they may feel themselves to be under in determining to what extent, if any, such hopes or pressures may have affected their testimony.

However, once you have decided, if you ever do decide, that any or all of the testimony of such a witness is factually accurate, you may, indeed you must, act on such factually accurate testimony.

There is another rule of general application, which is, that if you find that any witness who has testified before you has deliberately lied on a material matter — that is an important matter — you may, if you wish, reject and disregard everything that particular witness has said. But you are not required to do that. You may reject the part of his or her testimony that you find to be untruthful and accept and act upon such part as you find truthful.

Now, that again is just common sense. In your ordinary experiences some people may have told you a lie which you consider so outrageous that you say to yourself, I am never going to believe anything he or she may ever say again.

Life is just too short to be bothered trying to

Charge of the Court

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particular person is concerned. Or, on the other hand, you may, even after someone has told you some outrageous lie, consider the motives which caused the person to lie and conclude that in the future you will believe him or her in situations where you find such motives not to exist.

Like everything else, you act in the same common sense way you would in your daily life.

But remember this rule only applies to testimony that is wilfully false. It has no application to mistakes.

Let me illustrate by referring to the conflict in the testimony between Kilduff and Schmidt. Those two witnesses gave quite different versions of certain events.

First, as to what actually happened, it seems to me you can come to one of three conclusions:

"A. The Kilduff version is absolutely accurate;
B, The Schmidt version is absolutely accurate; or C. The
accurate fact lies somewhere in between.

Those are the three possibilities, it seems to me of what actually happened.

Now, having come to your conclusion as to factual accuracy, you may come to any of two conclusions as to the subjective truthfulness of the witnesses. First, you

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 could conclude that any witness who is found to be inaccurate was wilfully trying to deceive you or (2) you could attribute inaccuracy, even total inaccuracy, to the frequently observed phenomenon that with the passage of time, human memories tend to shift.

The point is it is only wilful deceit that calls into play the particular rule I have just discussed with you.

Now, I don't want you to think that because I used that illustration I think this conflict is all any particular significance in the case. I used it because it was a neat illustration of the point.

Now there have been brought to your attention certain statements made by some of the witnesses either before the New York Stock Exchange, the SEC, the grand jury or perhaps elsewhere. Any such statement was admitted because the party offering it -- and my recollection. is both parties referred to different statements at different times -- contended that it was inconsistent with something the witness had said on the stand before you.

Whether such inconsistency in fact existed and the extent to which any such inconsistency affected the value of anything the witness may have said before you is entirely for you to determine. The point I wish to make clear is that such prior inconsistent statements have no

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probative value of their own; they may not be used to establish any fact not otherwise proved. Their only proper function is to permit you to evaluate the sworn testimony the witnesses have given before you. To the extent that you find such statements helpful for that purpose you should consider them, otherwise, ignore them.

You will recollect that two summaries or charts have been submitted in evidence. As I told you at the time, these summaries and charts have no independent value of their own. They purport only to be summaries of other testimony and exhibits already before you.

As to each of these summaries or charts, you should consider two things: (1) Does it accurately reflect other evidence before you? and (2), if so, are you satisfied that the conclusions the chart maker seeks to draw from such other evidence are reasonable?

If you answer both these questions in the affirmative with respect to either or both of such charts, you may give them such consideration as you deem appropriate, otherwise ignore it or them.

Now let me turn to character orreputation testimony.

You will recollect what I told you when the first such witness was called. You should consider evidence of

character or reputation together with all other facts, all other evidence in the case in determining the guilt or innocence of the defendants. Evidence of good character may in itself create a reasonable doubt where without it no reasonable doubt would have existed. But if on all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty, a showing that he had previously enjoyed a reputation of good character does not justify or excuse the offense, and you should not acquit a defendant merely because you believe he is a person of good repute.

This brings me to the question of "reasonable doubt." Let me define that term for you. The words really define themselves. When you analyze it, it is common sense. In a civil case all the plaintiff has to do is establish his case by what is called a preponderance of evidence, which boils down to mean that it is more likely than not that what the plaintiff has asserted is true. If it is more likely than not, the jury is entitled to give the plaintiff its verdict. That may be fine and indeed it is fine when all that is involved is whether A should pay B" some money. But a purpose of the Government in bringing a criminal case is to authorize the Court to commit the defendant to jail. Whether I do that or not is my

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responsibility.

Coming to that point of the authority that the verdict will give me, I have talked to you many times about the division of authority and the division of responsibility between you and me, between counsel and me, and each of us has our own job to do.

that you find a verdict of guilty, will be to decide what, if any, punishment should be administered to the defendant or defendants. That is no concern of yours and you should not consider it. I must trust you to deal with the evidence and you must trust me to deal with any responsibility your verdict might impose upon me.

Nonetheless, as the rules guide you, the possibility, the potential of your verdict is what controls. And our liberties wouldn't be worth much if it were possible to put a man in jail simply because guilt seemed more probable than innocence.

Therefore, the law says guilt must be established beyond a reasonable doubt.

There are two words in that definition. "Reasonable and "Doubt."

The meaning of "Coubt" is self-apparent. The word "reasonable" is in the last analysis equally

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self-definable. It means a doubt for which you can give a reason. It isn't just a fanciful doubt or an excuse for ducking a disagreeable duty. No one likes to be in the position of convicting a fellow human being, but the law would also be in a sorry state if jurors wouldn't take the responsibility of finding guilt where it was established beyond a reasonable doubt.

Also the reasonable part of the term goes to the essence of jury deliberations. If one of you has a doubt and expresses a reason for it, and another juror has no doubt, the expression of your reason for your doubt will probably do one of two things:

It will either enable your fellow juror to demonstrate to you that your doubt is unreasonable, or it will enable you to demonstrate to him or her that he or she should have a doubt.

each other, you should be able to resolve them one way or the other.

Of course, a doubt like everything else in this case, a reasonable doubt must be based on the evidence or lack of evidence, not on something you may have heard on the outside or some impression or opinion you may have derived from the outside. It has to be based on the evidence or lack of evidence; otherwise, how could you discuss it with your fellow jurors?

All that you have in common with each other is what you have heard and seen in this courtroom. It is on that common basis upon which you must base your deliberations.

In this connection I may point out that while it is your duty to discuss your doubts or lack of them with each other and to listen to each other's views, you should adhere to any conscientious opinion which you might hold and not give it up merely for the sake of unanimity. I don't think there is anything I can add to that.

The law simply requires you to do your best to convice your fellow jurors of the correctness of your views and at the same time to listen with an open mind to theirs and to make a conscientious effort to reach a result which conforms to the conscientious belief that each

Charge of the Court

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of you holds.

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I assume you are not going to start unanimous. Unanimity comes from discussion amongst you, exploration of your doubts or lack of them, discussion of the evidence or lack of evidence upon which those doubts or lack of them may be based. That is how unanimity may be achieved.

Before I'leave the question of reasonable doubt, it being so important, let me read you another definition that is given by a judge for whom I have great respect.

"It is a doubt," he says, "based on reason which arises from the evidence or lack of evidence in the case. It is a doubt that appeals to your reason, to your judgment, to your common understanding and your common sense. It is a doubt as would cause you to hesitate to act in matters of importance in your daily lives. But it is not caprice, whim or speculation. It is not a doubt that a jury might conjure up to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. Let me repeat, it is a reasonable doubt."

That ends the quotation. As you see, it is not much different from what I said. I thought it said it rather well.

Closely related to the doctrine of reasonable doubt is the concept of presumption of innocence. That | ____

means that the Government has the burden of proof in this case and that such burden never shifts.

I have told you that the defendant doesn't have to prove anything. The point is that the presumption of innocence continues in his favor throughout the entire trial and remains there in the jury room until you have finally resolved it, if you ever do, by a verdict of guilty.

It means this:

Right up to the last minute your discussions should include the proposition that the Government has a burden, and if the Government hasn't sustained that burden, that, in itself, can be the basis for a reasonable doubt.

Now, let me turn to the specific charges set forth in this indictment. In referring to the indictment, let me remind you of what I told you while you were being selected. I told it to you at that time in more detail.

The indictment itself is no evidence of anything and creates no presumption of any kind or sort. I went into great detail on that proposition when you were being selected and I assume you remember what I then said.

Also before getting down to the specifics,

let me remind you what I frequently have told you, that

each of the defendants before you is entitled to have his

guilt or innocence separately considered. That these

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two defendants are being tried together before you is a matter solely for the Court's convenience. You have two separate lawsuits before you and you should consider the evidence separately as to each defendant.

As to each of these defendants there are two charges before you. Each defendant is charged with conspiring with Sloan, Eucker and Kilduff, as well as with the other defendant, to keep false records and to file false statements with the Securities and Exchange Commission in violation of the securities laws of the United States.

This is called the crime of conspiracy.

Each defendant is also charged with actually filing such a false report or causing it to be filed in violation of such laws.

What then are the securities laws of the United States? They are a series of statutes enacted by the Congress from 1933 to the present day for the purpose of protecting persons who invest monies in the securities markets of the United States. An integral part of these laws are certain record keeping and reporting requirements designed to assist the SEC and other regulatory agencies in their assigned task of insuring that the business is transacted on such markets by solvent and responsible individuals, partnerships and corporations.

Needless to say, such purpose would be thwarted if the record keeping and reporting requirements were not followed and enforced.

Remember, of course, it is no crime to become insolvent or go bankrupt. That is just a misfortune.

The only crime charged is that these defendants are claimed to have kept false records and to have filed false reports, to conceal their imminent or actual insolvency.

What, then, is the particular section of the securities laws which defendants are charged with violating and with having conspired to violate?

It is a section of the 1934 Act which provides in pertinent part as follows:

"Every broker or dealer" -- and obviously the firm

of Orvis Bros. was a broker and dealer -- "shall make, keep

and preserve such accounts, correspondence, memoranda, papers,

books and other records and make such reports as the Securities

and Exchange Commission by its rules and regulations may

prescribe as necessary or appropriate in the public interest

or for the protection of investors."

The principal SEC regulation with which we must concern ourselves is the one requiring brokers, such as Orvis Bros., periodically to file a questionnaire -- that is what it is called -- setting forth certain specified

Charge of the Court

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2 | financial information.

It is the claim of the Government that the defendants conspired to file such a questionnaire with certain materially false information and that in October of 1969 they actually did file or caused to be filed a materially false questionnaire.

The said questionnaire is claimed to be false in the following particulars:

A, Statements of the trading and investment accounts of Orvis were falsely inflated.

B, Statement of correction of customers fully paid securities loaned and pledged in error was false.

C, Statement of balances in customers cash accounts were falsely inflated.

Those are the particulars in which the Government claims the particular questionnaire was false.

The Government also claims that in the course of conspiring to file such false questionnaire the defendants in violation of other SEC regulations maintained or caused to be maintained false books of account in their own back office.

How then does the law define the crime of conspiracy?

The crime of conspiracy as defined in the statutes

Charge of the Court

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of the United States is substantially as follows:

If two or more persons conspire to commit any offense against the United States and one or more such persons does an act to affect the object of the conspiracy, he shall be guilty of the crime of conspiracy.

It is very simple. Let me repeat it.

If two or more persons, any two, conspire to commit an offense against the United States and one or more of such persons does ansact to further the object of the conspiracy, each shall be guilty of the crime of conspiracy.

You will readily see there are three elements of that crime, each of which must be established to your satisfaction beyond a reasonable doubt.

First, there has to be a conspiracy.

Second, the object of the conspiracy has to be to commit an offense against the United States.

Thirdly, one or more of the conspirators has to do something to affect such unlawful objective.

What then is a conspiracy? A conspiracy in ordinary layman's language is no more or less than a common undertaking entered into between two or more persons to achieve some unlawful objective.

We are always in our daily lives watching people

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engaged in common undertakings. If three of you should decide to have lunch together and should send one of you ahead to reserve a table and put in the orders, that would be a common undertaking. It only becomes a conspiracy, however, if the objective is unlawful.

Your first task, then, is to determine whether Sloan, Eucker and Kilduff, or any two of them, engaged in a common undertaking to violate the securities laws of the United States in the manner I have described.

A conspiracy obviously doesn't have to be reduced to writing and doesn't have to have any particular formality attached to it. It is, as I have said, simply a common undertaking.

Indeed, all conspirators don't necessarily
have to know what the others are doing or have done.
What is necessary, however, is that each conspirator knows
the existence of the common undertaking, is aware of its
unlawful purpose and intends to further that particular
unlawful purpose.

If you become satisfied beyond a reasonable doubt that such a conspiracy did, indeed, exist, you should then consider whether the Government has established, again beyond a reasonable doubt, that Anderson or Villani or both of them were knowing and wilful participants in

Charge of the Court

gwrf 9

such conspiracy.

You cannot stumble into a conspiracy by mistake.

A person cannot be guilty of a conspiracy because he associates with others who happen to be so guilty. A person can be guilty of conspiracy only if he knows a common undertaking is underfect, if he knows that such common undertaking has a particular unlawful purpose, and if he wilfully and intentionally decides to join in the common undertaking for the purpose of furthering that particular unlawful purpose.

Of course, once a person is found to have entered the conspiracy, it is immaterial whether or not he accomplishes his purpose in doing so or whether he ultimately receives any benefit from his conspiratorial conduct.

It should also be observed that to be a conspirator one does not have to approve or even be aware of all the details of the conspiracy or the conduct of its various members, nor does there have to be complete harmony among conspirators, any more than there must be harmony among participants in any lawful undertaking.

What is necessary and without which one cannot be deemed a conspirator is that he have knowledge of the basic unlawful object of the conspiracy, in this case, deceptive record keeping and deceptive filing

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with the SEC to conceal financial weakness, and that it was his deliberate intent to further that unlawful objective.

Obviously it follows from what I have said that knowledge without wilful participation is not enough, nor did either of these defendants have any obligation to stop the conspiracy just because they may have known about it.

To repeat, one can only become a conspirator by knowing and wilful participation in the unlawful objective.

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Now, Mr. Feinberg used some language in his summation which is confusing in the light of the rules I have just laid down.

He said and he contends that a conspirator can further the conspiracy by silence. Well, in a certain limited extent that is true.

I am going to illustrate that proposition by an illustration having nothing whatever to do with this case. I do that guite deliberately because if I try to illustrate it by this case, I just couldn't help but make you think that some of the things I am saying are more important than others or I was adopting Mr.Feinberg's argument or something.

Just supposing that we have a conspiracy to steal money from a bank and one member of this conspiracy is a bank teller. In my supposition the bank teller isn't going to do anything, but he is a member of the conspiracy, he knows about it. The conspiracy is going to take place at, say, 2:30 on a given afternoon when he in the normal course of his duties would be at his post.

post. He knows the conspirators know that if he absented himself from his post there would be trouble at the bank and the scheme wouldn't go through.

So his part in the conspiracy is to go to his post and say nothing. That is all he has to do in the conspiracy. If he is there for the purpose of carrying on the conspiracy, and it was the deliberate decision of the conspirators that he has to be there, that his presence is necessary to have him there for the carrying on of the conspiracy, his presence there and his planned silence could be a furtherance of the conspiratorial purpose.

Let me just change the situation a little bit and show how he is not. He happens to know all about the conspiracy because his brother is in it, but he had no part in it. He knows the robbery is going to take place at that time, but he is not part of it. He is at his place.

Because his brother is in it he decides he is going to keep his mouth shut, he is not guilty of anything.

As far as the law of conspiracy is concerned,
that poses no obligation to be your brother's keeper. This
hypothetical teller in the second case, he knows all
about the conspiracy, he heard all about it from his brother,
he has pleaded with his brother to stay out of it, he
stands there, he watches the thing go on, he says nothing,
he is guilty of nothing. If he is part of the conspiracy
and he goes there for the purpose of maintaining his silence
so that the conspiracy won't be interrupted, he is part of

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the conspiracy and can so be considered.

I tried to give you that illustration which I think you can apply to any set of facts. I have taken a wholly disparate set of facts for the deliberate purpose of not giving you any views, suggesting any views on the facts before you.

To sum up, before either defendant can be considered guilty of the conspiracy, he has to have been found a deliberate participant in it.

On the other hand, if you found such knowing and deliberate participation to exist, its extent is immaterial. It doesn't make any difference if you are the main conspirator or the least important one. If you knowingly participate in the conspiracy, your guilt is equal, and that is all there is to it.

and that one or both of the defendants participated in it, it next becomes necessary to determine whether any conspirator, not necessarily one of these defendants, committed what is called an overt act in furtherance of the conspiracy.

It is a peculiarity of the law of conspiracy that mere talk and agreement is no crime. Someone has to do something. I am not going to waste much time on this issue.

The indictment charges among other things, as an overt act the filing of the false questionnaire with the SEC. You can't very well have found a conspiracy to exist without having concluded that the questionnaire was filed in furtherance thereof.

As such a conclusion would satisfy the overt act requirement, I shall trouble you no further with that issue.

In this connection let me tell you that the indictment lists a whole series of overt acts. If you get any pleasure reading them, by all means do so. But don't waste time on them. As I have said, one is all you need to find, and the filing of the report would satisfy that requirement. As I say, you can't find conspiracy without finding that report to have been filed, so that is that.

or both defendants to have participated in it, you should then go on to consider whether such defendant or defendants are guilty of what is called the substantive crime of actually filing the false financial statement with the SEC.

This is the second count of the indictment. It is the eighth numbered count. It is the second one that is going to be submitted to you.

The Government does not contend that either

defendant actually filed the statement in question. No such allegation is necessary.

The law provides that when an unlawful act is done in the furtherance of a conspiracy by one of several co-conspirators and such unlawful act was in the reasonable contemplation of the conspirators, each conspirator is as guilty of performing the act as the person who actually does the deed.

I chargeyou as a matter of law that the wilful filing of a financial questionnaire, in this case Exhibit 74, is a crime against the United States if such questionnaire is materially false; that is to say, false in a manner which would tend to defeat the legislative purpose of what the questionnaire was designed to further.

so if you should find any defendant to have been a member of the conspiracy, you should, remembering that you have two trials here, ask yourselves the following questions with respect to the case against such defendant — of course, you are not troubling yourself with this unless you find the particular defendant already guilty of conspiracy—(1), was the questionnaire materially false? That is, false in a manner which would tend to defeat the legislative purpose?

(2) Was it: filed in the furtherance of the

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conspiracy?

- (3) Was its filing within the reasonable contemplation of the defendant whose case you are considering?
- (4) Did Kilduff or whoever else may have actually have done the filing know that the questionnaire was materially false at the time it was filed?

If you answer all those questions in the affirmative beyond a reasonable doubt, you may convict the defendant whose case you are considering of the substantive crime of filing a false statement, even though there may be no evidence that the particular defendant knew that the questionnaire was false or even that it existed.

Let me remind ou of the particular manner in which the Government claims the questionnaire to have been false.

The falseness, according to the Government's claim, lies in three particulars. I read them before, but I am going to read them again for a different purpose.

- "(a) Statements of the trading and investment accounts of Orvis were falsely inflated.
- "(b) Statement of the correction of customers' fully paid securities loan and pledged in error was false.
 - "(c) Statement of balances in customers' cash

accounts was falsely inflated."

Let us briefly analyze some of the main categories of evidence with respect to those claims. First, there has been evidence offered in support of the claim that two blocks of Clinton stock were placed in the firm's trading account without proper allocation of cost. Such evidence obviously was offered to support the claim that the statement of the trading and investment account of Orvis was falsely inflated.

Whether and to what extent it does support such claim is, of course, for you to say.

Second, you have heard all about the \$80,000 trade in Clinton stock. The Government contends that to the certain knowledge of at least some of the conspirators, including specifically the defendant Anderson, such trade never existed and gave rise to no valid receivable.

To the extent you believe this claim to have been substantiated, you may conclude that the receivables reflected by this alleged trade falsely inflated the balance in the customer's cash account. Obviously it is for you to say whether the claim was substantiated.

Similar considerations apply to the Fund of
Letters transaction. There the Government contends that
at least by the time the questionnaire was filed it was

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obvious to the alleged conspirators, again specifically the defendant Anderson, that Orvis had no valid trade for this stock and that its inclusion among the firm's receivables falsely inflated the report of customers' cash accounts.

Needless tosay, the Government's claim is hotly disputed. The resolution of that dispute is in your hands.

You will also remember the testimony concerning fully-paid securities pledged in error. All such testimony relates to the Government's claim that statements of the correction of customers' fully paid securities loaned and pledged in error was false.

Now let's list someof the things that are not in issue. Taking last things first, there is no claim in this trial that either of these defendants ever had the slightest notion that anyone concerned with Orvis had ever intentionally made an improper pledge of stock.

You will recall the testimony of several Government witnesses that in the nature of the brokerage business errors in the pledging of stock are inevitable.

The sole Government claim in this regard is that the conspirators, not directly either of these on trial, misrepresented their efforts to correct the inevitable

errors, thus contributing to the claimed falsity of the questionnaire.

Another thing that is not directly in issue is whether the firm was in violation of Stock Exchange Rule 325, the one establishing the 20:1 ratio, or, indeed, any other rule of the Stock Exchange.

The Government's contention in this regard is solely that the claimed violation of Rule 325 provided a motive for the alleged false filing and record-keeping. The validity of that contention is, of course, for you to determine.

The defendants contend that, at least as to them, the contention is wholly without basis because they say they were wholly ignorant of any Rule 325 violation that may have existed.

One cannot, of course, be motivated by circumstances of which one is ignorant. Therefore, if the defendants were ignorant of the 325 violation, if it existed, they weren't motivated by the knowledge which they didn't have.

Another thing that is not in issue is whether defendant and/or any other Orvis prtner, was a good or a bad businessman.

All the evidence and the activities of either of these defendants is relevant only on the question of what

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he may or may not have known at some given point in time.

All this talk about Anderson's power in the firm, what

he did, what he didn't do, when Mr. Villani was in Paramus

where he was, what they did, what they didn't do, has

nothing to do with their guilt or innocence except as it

has bearing on what they may have known at a given period

of time, and, therefore, what they may have tended to do

about such knowledge.

Ladies and gentlemen, that is the gist of what

I am going to tell you. There are some formalities I

will tell you, in any event, later even if counsel have no suggestions, which is unlikely.

So I am going to ask you now to retire for a few minutes and, as I told you before, this is the last time I am going to ask you not to form or express an opinion and I say this quite seriously now because it is quite possible that one counsel or the other counsel may point out something which I said intentionally or inadvertently, which is wrong, and when corrected will materially change the picture of the case that you have to consider.

(Jury absent.)

THE COURT: First, I guess, Mrs. Piel.

MR. PIEL: Very well. This comes from my notes,

your Honor.

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MRS. PIEL: Then. your Honor, I presented a proposed instruction on character witnesses which your Honor did not incorporate the essence of.

THE COURT: What didn't I say?

MRS. PIEL: It went alittle further, saying that in a securities case, the evidence of good character is something which has particular relevance.

THE COURT: You said that? On Page 8 of your proposed instructions?

MRS. PIEL: I believe it is Page 18.

THE COURT: Show it to the Government.

MRS.PIEL: I was a bit concerned about the use of the word "solvency." I don't recall the exact wording, but the 20:1 ratio suggests, at least to my lay mind, an insolvency of 19 times, and it seems to me that as a word of art, solvency is a rather bad word to use because if you are to look at a balance sheet of a brokerage house, and it meets the requirements, still a large percentage of it is solvent. It seems to me it is misleading to use the word "solvent" rather than a portion of assets to liabilities

THE COURT: Well, the purpose of the act, it seems to me, is to insure solvency and responsibility. Do you dispute that?

MRS. PIEL: Then I say there is an inconsistency

1	meb-2
	men-2

in permitting --

THE COURT: They think that is solvent enough,

I guess.

MRS. PIPL: Well, I will leave that, but it seems to me that there could be a confusion in a layman's mind.

Then perhaps more serious, your Honor, at the very end of your charge you spoke about knowledge and falsity but throughout the charge, you spoke of falseness without knowing falseness.

THE COURT: I don't follow what you are saying.

MRS. PIEL: Well, let's assume that the jury finds, or that anyone would find that Exhibit 74 is a false statement of accounts for Orvis Bros. Let's assume that --

THE COURT: Well, I can cure that by saying any time I said false, they must assume I meant knowingly false.

MRS. PIEL: Fine, I think that would correct

it.

THE COURT: I will also tell them when I said if they find, they must find beyond a reasonable doubt. I can't repeat that phrase all the time. That cuts against the Government, but not in any material point.

MRS. PIEL: Then when you described the conspiracy, it seems to me that you referred only to a common

undertaking, and I wonder whether or not -- it seems to

me that these defendants could not be guilty of entering

into a conspiracy unless they had an agreement of some kind.

I don't say it is in writing or whatever, but a common

undertaking. I don't really know what a common undertaking

is.

You gave an example of going to lunch and one goes ahead, and that is an agreement of have lunch. And it seems to me that no matter what happened in this case, there has to be a common undertaking and by circumstantially saying they did this, that therefore there was a common undertaking —

THE COURT: I will tell them what common under-taking means.

MRS. PIEL: There has to be agreement.

Then in the example that your Honor gave about the bank teller and the two situations where one person was a conspirator, was guilty by silence and the other was not because he didn't enter the conspiracy, that of course again goes back to the fact there has to be an agreement, but in your second example you suggested he wasn't a conspirator also because he pleaded with his brothers not to participate.

Now that suggests that if either Mr. Villani

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MR. LONDIN: I must say I am rather pressed at this point to think of it too.

THE COURT: If it doesn't apply, I don't want to

the jury that since there are two particular counts and two

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particular defendants they should of course be careful not to arrive at a compromise verdict, that any verdict they arrive at must be their conscientious determination and not the result of compromise.

THE COURT: I will so charge.

MR. LONDIN: For the record I do wish to take exception to your Honor's reading of the securities laws. I think that unduly prejudices the defendant on trial and leads them to believe that they, the public, may have some vested interest in a conviction because the public is being protected thereby.

I don't think it was necessary to read the legal history, give a discourse on the legal history, the purpose of the securities laws. I don't see that there is anything your Honor can do withthat at this point unless you can think of some way to correct it, if you think it requires correction.

THE COURT: I don't think it does. I agree with you you shouldn't harangue the jury about their duty to protect people, but I don't think I will do it.

MR. LONDIN: With respect to the substantive count, your Honor, in discussing the substantive count, your Honor did correctly tell the jury that this would follow, I suppose, under the reasoning of Pinkerton, if

your Honor found the defendant a participant in the conspiracy.

THE COURT: Not if I found it.

MR. LONDIN: Tell the jury that they could find the defendant guilty of a substantive count if they found a defendant a participant of the conspiracy. However, that essential predicate having come substantially before, it was rather lost. I am concerned lest the jury think they can convict on the substantive count; even though a defendant did not happen to be at the World Series at the time of the review and did not submit the report to the SEC they might find that sufficient.

I think they should be told in the clearest possible terms that this only follows, of course, if the defendant was a wilful participant in the conspiracy to make and file false records.

THE COURT: I thought I made that very clear.

I think I will clarify it altogether by telling them they

can't convict on the second count unless they have already

convicted on the first.

MR.LONDIN: And with respect to the Fund of
Letters transaction --

THE COURT: I can't conceive of any rational way they can do that.

MR. LONDIN: I think they should be told that.

With respect to the Fund of Letters transaction, your Honor very briefly said the Government's theory was that the entry was improper because the defendant -- particularly the defendant Anderson -- knew the transaction had been rejected, and then your Honor said of course the defense hotly disputes this. But I think having expressed the Government's position, your Honor should also express the defense position which simply put was the matters had been discussed with Haskins & Sells and a reserve increased. The matter was under negotiations. It was then an attempt to register the stock, it was then referred to the lawyers, in Anderson's thinking, the transaction may well have been open until December 31,1969, on the basis of a letter in evidence.

MR. FEINBERG: Your Honor, we would oppose that The increasing of the reserve was precisely a conspiratorial act.

THE COURT: I will say, what has to be proved is that Anderson knew. There isn't any doubt about it wasn't an open thing. Those are arguments. I didn't give them the Government's arguments. I will point out in that connection what they have to find is not that in fact it wasn't a good deal and a valid deal, but Anderson at the

time knew it. You have heard everything Mr. Londin said about that. I am not going to repeat it.

MR. LONDIN: All right.

THE COURT: I will say that.

Have you shown Mr. Londin and Mrs. Piel this indictment?

MR. FEINBERG: I will give them a copy of the clean indictment.

THE COURT: You better look at it now before I give it to the jury.

MR. FEINBERG: I have a couple of comments on the charge, if I may.

THE COURT: In the first place, did I rule adverse to the defendants on anything wrong? You have got to defend this verdict if you get one, I don't.

MR. FEINBERG: I don't believe so.

THE COURT: All right, what doyou want me to say?

MR. FEINBERG: The only thing I want to ask, maybe
I didn't hear it, did the Court charge on wilfulness and
intent as, you know, just boilerplate, but did the Court
mention what wilfulness, and what knowingly and wilfully
mean?

THE COURT: I did not. Does the defendant want me to do that?

	meb-10	Exc	ceptions to Cha	rg●	3053
2	1	MR. LONDIN:	Yes, sir.		
3		THE COURT:	What do you wa	ant me to say	about
4	it?		•		
5	1	MR. LONDIN:	Well, with re	spect to know:	ing, the
6	requirement	that it be	done knowingly	and wilfully	, that the
7	defendant mus	st be aware	of what was go	oing on and de	eliberatel
8	set out to jo	oin what wa	s being dome a	nd made himse	lf a part
9	of it.				
10		THE COURT:	Have you seen	Government's	s Request
11	27?		*		
12		MR. LONDIN:	I just got t	hen this morn	ing, your
13	Honor.		•.		
14	i i	THE COURT:	Look at 27.		
15	1	Mrs.Piel, d	o you have it?		
16		MRS. PIEL:	Less than a h	alf hour ago.	
17		THE COURT:	Don't read the	m all, just 2	7.
18	i. :	MR. LONDIN:	All save the	last paragrap	h is
19	satisfactory	, your Hono	r.		
20	!	THE COURT:	I think I wil	l take that o	ut. I
21	would have s	aid it if I	had put it in	the regular	charge.
22	It is a nega	tive which	doesn't need t	o be in.	
23	1	MR. FEINBER	G: One other	thing, your H	onor.
24	Would your H	onor charge	Request 24 of	the Governme	nt which
25	is the only	one that we	would ask you	to charge th	at I don't

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think your Honor did. That deals with the charge that the mere fact the defendants believe that there won't be any loss or that anyone will be harmed is no defense.

THE COURT: They never raised that issue.

MR. FEIMBERG: Other than that I have nothing else.

THE COURT: They never raised that. Nobody seriously thinks that nobody was hurt by it.

MR. LONDIN: Actually no one was except the Stock Exchange funds, your Honor.

THE COURT: What about all these partners that were sucked in?

MR. LONDIN: Well, that's true. But they no more than the defendants themselves lost their money.

THE COURT: No, they feel there is quite a difference between them. My point is that I don't think the jury is going to be misled.

Now let me go over what we have done. In the first place is that indictment all right?

MR. LONDIN: I just read the latter part of

Page 1. I noticed in Paragraph 1 the last two lines had

previously been stricken as one sentence which reads:

"As of June 3, 1970, Orvis was suspended as a member of the

New York and American Stock Exchange." That was

THE COURT: I want to know if I can tell them

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they can ask for exhibits.

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1	meb-13 Court's Additional Charge 3056
2	MR. LONDIN: Yes.
3	THE COURT: Okay.
4	Okay. Incidentally, when we are through
5	talking to them, I will have a side bar conference so you
6	can correct anything further.
7	(Jury present.)
8	THE COURT: Will the alternates bring back any-
9	thing they have from the jury room?
0	THE FORELADY: Can't they have lunch with us?
1	THE COURT: No. They can have lunch together.
2	THE FORELADY: Your Honor, there are some docu-
13	ments that various members of the jury already know they
14	want.
15	THE COURT: I will tell you about that.
16	THE FORELADY: We have already made one, there ma
17	be others, but this is what they know now they want. Mostly
18	they are not by number because we didn't know.
19	THE COURT: Well, I will give that to counsel. I
20	will explain about that in a little bit.
21	THE FORELADY: Do you want me to give you that
22	later?
23	THE COURT: No, I will keep it.
24	Well, ladies and gentlemen, there is nothing
25	materially different that I am going to tell you, just

1	meb-14 Court's Additional Charge 3057
2	some things that one counsel or the other thought I
3	may have unintentionally given you.
4	Several times I used the word "false" and other
5	times I used the word "knowingly" false.
6	You get tired of hearing the same words. But an
7	time on the charge I used the word "false," you just think
8	that means knowingly false. Whether it can be accidentally
9	false has nothing to do with the price of fish in this
10	case.
11	WhenI said false, you add on the word "knowingly
12	false."
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By the same token, several times I said you have got to find this and you have got to find that for different purposes. I may not have used the words "beyond a reasonable doubt."

Any finding I told you you had to make in any phase in this case has to be beyond a reasonable doubt.

If I didn't say it, I didn't mean to differentiate.

You just get tired of hearing the words sometimes and you skip them.

Now I told you about in defining a conspiracy.

I said it was a common undertaking and I gave several illustrations. Now, one of the counsel suggested that you may get the idea that I am telling you there doesn't have to be any agreement. There does have to be an agreement for there to be a conspiracy by definition. But you don't have to find that they sat around and said, "We agree."

What I mean is you can infer the agreement from what you see them do. The illustration I gave of the common undertaking, where three of you go to lunch and send one of you ahead to make a reservation and order lunch, but there had to be an agreement otherwise you wouldn't know what you were doing. But my failure to use the word "agreement" doesn't mean that you don't have to find an agreement. It has to be a common undertaking and if

you see a common undertaking going forward you can infer, if you wish, that everybody has agreed to do what you see them doing.

All right, then the illustration I gave you about silence. In the illustration of the non-participating, I told you about his brother, and I injected in the thing he may have pleaded with his brother to stop. Well, that was just a kind of flourish I put in. If he hadn't pleaded with his brother to stop he still would not be guilty. There is no necessity of pleading to stop the conspiracy. I just kind of threw that in. I might have confused you and you might have thought that this second illustration he would have been guilty even if he just failed to use moral suasion with his brother. He didn't have to do anything. He may know all about it and maybe secretly in his heart clad it is happening.

It has nothing to do with it. Unless he participates
in it he is not guilty of a conspiracy. So that little
flourish I put in was not intended to change the meaning.

Now, you will recollect I told you what the Government's contention was with respect of the Fund of Letters situation and I said that that was hotly disputed.

Of course, I am not going to repeat the various arguments that Mr. Londin made, but Mr. Londin's point

in all this is that Mr. Anderson didn't think it was a non-trade. It doesn't make any difference what God knows about the facts and he is not going to come in and tell it; what God knows about the facts is immaterial.

It may have been a trade or it may not have been valid trade as God might determine. It is what Mr.

Anderson thought and knew. That's the only materiality here.

And if Mr. Anderson was under the impression that it was a valid trade at the time in question, that ends the matter.

It is what Mr. Anderson thought is relevant on that issue.

Now, I told you things had to be done knowingly but I didn't give you a definition of knowingly. I don't really think it is necessary, but the courts do say you should give a definition of knowingly.

Now, the definition of "knowingly" is as follows:

An act is done knowingly if it is done voluntarily and purposely, not because of mistake, accident or mere negligence or any other innocent reason. An act is done wilfully if it is done knowingly, deliberately and with a bad motive or purpose.

That's what knowingly and wilfully have been defined as. To my way of thinking these are rather obvious definitions.

Now, needless to say, these are two defendants.

Each is entitled to a separate consideration. And quite obviously, I rather hesitate to say this because it is so obvious, there can't be any compromise verdict. You can't say, well, let one of them go and get the other. Each is as though he were separately on trial before you.

Now there are two counts. I told you that you are dealing with each defendant. You can only consider the defendant's guilt on the second count if you found him to be a deliberate participant in the conspiracy. I am going to simplify that a little bit by just telling you you can't find a verdict of guilt as to either defendant on the second count unless you have already found a verdict of guilt as to that defendant on the first count. And then it is perfectly obvious to you that you can't find him guilty on the second count unless it is established to your satisfaction to have been guilty of a conspiracy because you have already declared that by your verdict, so don't consider the second count, as to any defendant, unless and until or until you have already found a verdict on the first count as to that defendant.

Now, you already have sent up a list of exhibits and they will be sent to you. I will just tell you how these things work. Anything you want to know you just

ask.

Now, sometimes you are obviously not going to remember all these numbers. Sometimes you will be able to describe what you want so that everybody will agree immeditely what it is you want, in which event it will be sent in right away.

If you can't, we will send for you and I will question you to find out what it is. And you will get it. Anything that is in evidence you can have.

The second point. Any time you want any testimony read back you may have it read back, but especially on testimony and in this case even on the question of documents, there are so many, don't expect instant replay. Because you are going to ask a question, and obviously, that particular question, won't have been in any counsel's mind, so there will have to be a good deal of looking around through the record to find out what testimony is relevant to the particular question you have asked.

If counsel can agree among themselves, I don't get involved. If counsel can't agree I have to decide and if I can't decide I have to send for you.

But the point is all of this is a time consuming process so unless it is something vital that will hold up everything, put it aside and in due time we will send for

you and you can hear it.

Also if you have any questions as to law that
you want clarified, anything I have said that you don't
understand or anything that I failed to say that puzzles you,
don't have any hesitancy in sending out a request that I
either repeat myself or enlarge it or make clear something
I haven't covered. You have got to remember I am an
expert just like some of you are in your own fields, and I am
in the habit of talking to other experts in my own field,
and therefore I try to avoid it when I am talking to the jury,
but I inevitably get in the habit of using shorthand
language that means a lot to me and Mr. Londin and Mrs. Picl,
but may not mean anything to you.

If that happened, I have no pride of authorship, and don't have any hesitancy in asking me for either repetition or further explanation.

But one thing I want to caution you, in no message that you send out to me indicate how you stand on any particular issue.

Now, you can tell me you are deadlocked ten to two or six to six, whatever you want to say, it is true. I am not suggesting you are going to be. But don't tell me how you stand or you are for the defendant or against the defendant on any issue.

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Now you will quickly see why that is so.

If you do become deadlocked, I may consider it would be helpful if I discussed with you ways of breaking the deadlock. I might suggest something that might occur to me in the light of what you told me.

Now, if I know that you are ten to two for one way or the other there is no form of language that I can think of that would not convey to the two the idea I am trying to get them to switch over and go with the ten. If I don't know, if all I know is mathematically it is ten of you on one side and two on the other, and I don't know who is on first, so to speak, then I can discuss with you perfectly reasonably the advisability of how to explore your differences without giving the two any theory that I am telling them that they ought to join the ten because I think the ten are right, because I don't know which is ten and which is two. So just don't make that mistake.

Now, in due time, a copy of the indictment will be sent in to you. A lot of things have been left out of that indictment. You will see by reading it. The numbers aren't sequential and things like that. In one case it says, "Statutory reference omitted at the Court's direction."

Now what has happened is that I, with the assistance

of the parties, have gone through this indictment and taken out everything that is irrelevant to this particular trial. If we were trying some of the other defendants maybe things would be relevant. So don't speculate why there are blanks in the indictment.

Now this one I'referred to is a list of statutes and I took them out because I said, "What in the deuce do they want to know a lot of statute numbers for?"

That's why I took them out.

But other things are taken out. But this you can have and you can read if you want to, and it is available to you. But there is one mistake we just noticed so there has to be one page typed up. So you won't get it until after lunch.

Now, one thing I forgot to tell you. There is no such thing as a non-unanimous verdict in a criminal case in the federal courts of the United States. So, eleven to one is no good. Either way, either guilty or not guilty, not guilty or guilty, the verdict must be unanimous. So before I conclude I want to confer with counsel at the side bar.

(At the side bar.)

MRS. PIEL: I thought your Honor said you were going to tell them that they couldn't find them guilty

of the substantive count without --

THE COURT: I did.

MRS. PIEL: It's all right. I don't know where my mind was. One thing I did not mention in my exceptions was my proposed instruction No. 11 about the statute of limitations in the overt acts.

TH J COURT: What's that got to do with it?

MRS. PIEL: Well, some of the overt acts charged--

THE COURT: I only permitted one overt act.

MRS. PIEL: What are we doing with this indictment?

TH | COURT: It doesn't make any difference.

They have to find the one I submitted. I am not going to give it to them now.

MRS. PIEL: Some of these are actually barred by the statute of limitations.

THE COURT: I would have done it if you asked me, called my attention to it earlier, but I don't want to do it now. I don't think it is important and I think it is too confusing.

MRS. PIEL: Then we should leave these out.

THE CO RT: There is no reason they can't consider them as evidence.

MRS. PIEL: Then I do except because they are under my proposed instruction barred by the statute.

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THE COURT: I have told them the only overt act they can consider is the filing of the questionnaire.

MR. LONDIN: I take it I have the benefit of Mrs. Piel's exceptions.

MRS. PIEL: Could I have my proposed instructions marked.

THE COURT: Yes.

MRS. PIEL: And an exception to all of them.

THE COURT: Yes.

MR. LONDIN: Liddle think of an illustration, an example to my DeSisto argument. During the cross examination of Mr. Kilduff directed at his contention that there were discussions about capital problems at Orvis in March,

I pointed out to him that before the Stock Exchange he had said --

THE COURT: DeSisto doesn't apply if it was not under oath.

MR. LONDIN: No, but he did concede he said it.

MR. FEINBERG: On the new indictment that we prepared the Government numbered everything so that it is sequential and there are no gaps.

(In open court.)

TH J COURT: Mr. Feinberg tells me he has renumbered the indictment so there won't be any gaps in numbering.

So don't look for gaps.

merf 11

I submit to you and the act which you must find to have existed in order for you to consider conspiracy to be completed is the one about the filing of the questionnaire. As I said, you can read the other overt acts if it gives you pleasure but finding them won't prove anything; you have to find the one I submitted to you.

Just a very minor thing. It was called to my attention when I talked to you about the 80,000 shares

I talked about \$80,000. But I wanted to mention that to you.

All right, ladies and gentlemen, now, you have two cases before you and your verdict as to each case will be guilty or not guilty. Not guilty or guilty on the first count. If it is not guilty that's the end of that case. If it is guilty you can consider whether or not it will be guilty or not guilty in the second.

So as to each case that's your verdict.

Defendant A guilty or not guilty on the first count and in the event it should be guilty, you then consider guilty or not guilty on the second count. If it is not guilty on the first count you don't go to the second count.

My thoughts if any as to the guilt or innocence

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of these defendants are of no consequence. I have full confidence that justice will be done in this case. The marshals will be sworn.

(Marshals sworn.)

THE COURT: All right, the alternates will say behind and the ladies and gentlemen of the jury will follow the marshal.

(Jury retired at 12:40.)

(Alternate: jurors excused.)

THE COURT: On the record, The Forelady asked if I had any suggestion if the vote should be secret or how they should vote and I said that's entirely up to them.

Anything further on the record?

MR. FEINBERG: Your Honor, is there a note?

THE COURT: Yes, make this a Court's Exhibit.

(Court's Exhibit 7 marked for

identification.) '

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(In open court; jury present.)

(Note from the jury, 2:55 P.M.)

(Note marked Court Exhibit 8.)

THE CCURT: Good afternoon, ladies and gentlemen.

I have your second note. I don't think we have any real

problem, except one thing, in your first note you asked for
the minutes of the New Jersey meeting.

Well, those minutes were just marked for identification. It wasn't marked in evidence.

THE FORELADY: That is why I didn't put it down the second time. I figured that was it.

THE COURT: That is why you can't have it.

Now, IBM transfer of 5000. I assume whatyou mean is just this copy. All right. And the rest I think is clear. The Haskins & Sells report, that is here. And then the Anderson -- Mrs. Anderson's subordinated lender account and limited partnership.

What is this again?

MR. LONDIN: The limited partner account which you remember we had a discussion about. I marked something with a paper slip so your Honor would inquire if it is applicable.

THE COURT: We assume all you want is the limited partnership account, the tracing of 50,000, and

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THE COURT: Many times they mark them for identification but they don't get in evidence.

THE FORELADY: That's the reason I didn't put them down the second time.

MR. FEINBERG: These are the minutes of the meeting where the Goodbody report was discussed.

THE FORELADY: Your Honor, is there any way in which you can put in a short or simple sentence the substance of Count 1 of the indictment? You know there are pages and pages of it and if I try to ask people to vote on Count 1, is there any way of putting it in a nutshell? Do yousee what I mean? Count 2 is on one page and I think I can probably put a question on Count 2, but Count 1 goes all over the place.

THE COURT: As soon as I get their attention.

MR. FEINBERG: Would your Honor inquire of the jury. I believe this is what they want on the minutes of the Goodbody, Mr. Eucker's discussion.

THE FORELADY: The meeting with Eucker and Goodbody on two sides of the table, everybody else around.

THE COURT: This memorandum?

THE FORELADY: We want the min. ces.

THE COURT: If that is it they can have it.

Now, the jury has asked whether there is any way

to summarize the first count which is conspiracy. Well, for the purpose of voting, you just should ask the jury whether they vote guilty or not guilty on the conspiracy count. You don't have to read. You can read what I said about it. It is a conspiracy to violate the federal securities law in the manner in which I described and in order to find either defendant guilty, of that crime, you must find all the elements which I described at considerable length. You can pose the question to the jury among yourselves. All you have to say is defendant so and so guilty or not guilty of the crime of conspiracy.

THE FORELADY: In other words, is he or is he not a member of this conspiracy?

of putting it. But he has to be a member of the conspiracy and the conspiracy has to be for the purposes which I described. The simple way of expressing that is he guilty of conspiracy as defined by the Judge.

THE FORELADY: Thank you.

THE, COURT: Okay, now give those to the jury. Okay, I guess you better take them in.

(Jury retired at 3:05 p.m.)

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(5:45 p.m. a note was received from the jury.)
(Note marked Court's Exhibit No. 9.)
(In the robing room.)

THE COURT: Court's Exhibit No. 9, "If there was a conspiracy consisting of several parts and a defendant knew of only one part, does he thereby have knowledge of the conspiracy?"

That question obviously can't be answered yes or no.

Off the record.

(Discussion off the record.)

(In open court, jury present.)

THE COURT: Ladies and gentlemen, I have your message which has been marked Court's Exhibit 9, which reads as follows, "If there was a conspiracy consisting of several parts and a defendant knew of only one part, does he thereby have knowledge of the conspiracy?"

That question can't be answered yes or no. I think I will just restate the basic definition of what does have to happen with this question in mind.

The indictment charges one conspiracy, namely, a conspiracy which has as its unlawful objective the keeping of false records and the filing of false returns in violation of the securities laws of the United States.

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The motives of that we have discussed, motive to deceive the Stock Exchange and other people. The unlawful objective of the conspiracy is to keep false records and file false returns or a false return, namely, the questionnaire.

In order to become a part of the conspiracy, any defendant must know -- he must do more than know, as I will come back to it -- any defendant must know and subscribe to that basic unlawful objective, namely, the keeping of false records and the filing of a false questionnaire or return.

Me doesn't have to know exactly how the unlawful objective is going to be achieved. He doesn't have to know the details, he doesn't have to know what any conspirator is going to do. He doesn't even have to know, as I told you, that this particular false questionnaire was going to be filed and even existed. He does have to know that the objective of the conspiracy is to keep false records and file false returns. He doesn't have to know the particular one that was, in fact, filed.

Of course, he has to do a lot more than know. He has to know the conspiracy is underfoot and he has to wilfully and deliberately and everything else I told you decide to participate in it and by his conduct to

131a
Exceptions to Additional Charge 3076

gwrf 3

further its unlawful objectives. If he does that he can be found to be a member of the conspiracy and guilty of the crime of conspiracy regardless of whether he knows any particular detail or any particular method that his co-conspirators may elect to further the basic unlawful objective to which he has subscribed.

THIFORELADY: May I ask this? If there are several items in this false report and a defendant knows of one, does he know of the conspiracy?

THE COURT: He doesn't have to know anything about the false report. He has to know that it was the objective of the conspiracy, of his conspirators, to file this sort of paper. He doesn't have to know anything about this particular paper. It has to be within his reasonable contemplation that this sort of paper would be filed and that it would be false and that it would be materially false. He doesn't have to know anything about the particular falsehoods that happen to be in this particular paper.

Wait a minute. I want to get any comments from counsel.

(At the side bar.)

MRS. PIEL: Your Honor, I take exception profoundly to what you just said because you really left out -- 1 gwrf 4

and I think that the Forelady's comment -- you left out
the important concept of agreement. He has to do more than
know. You used the word decide to participate in. That
could be subjective. There has to be an agreement. It
seems to me that has to be emphasized. Even when you first
addressed the jury before we excepted, you said there has
to be a common understanding. It seems to me all those
words emphasize the subjective quality, and for a person
to be guilty of the conspiracy he really has to agree.

MR.LONDIN: I think your Honor should also instruct them he must do some affirmative act.

THE COURT: I did say that.

MR. LONDIN: I don't think it was strong enough,
your Honor.

MR. LONDIN: He must do something affirmative,

your Honor. He must take some action evidencing his agreement.

THE COURT: I think I said that.

MR. LONDIN: I also think your Honor should instruct them, and I think your Honor has decided to the contrary, that they must find that the objective of the conspiracy was to file this false report.

THE COURT: You have an exception to that.

MR. FEINBERG: All I want to say, in light

of what Mrs. Piel said, I thought that the explanation you gave was exactly what they asked for. I don't think one more word should be said.

THE COURT: I think Mrs. Piel's qualification is worthwhile.

(In open court.)

THE COURT: I have nothing to add except, of course, everything I have said is qualified by everything I have said before, there must be an agreement, everything. I am just answering your question and I wasn't taking away anything of what I said before as to the necessity of agreement, wilfulness, acts, everything.

You asked me just about knowledge, and that's what I answered.

(At 6:00 p.m. the jury returned to the jury room to continue their deliberations.)

THE COURT: As I indicated, ladies and gentlemen, I intend to send them to dinner around 6:30 if they haven't come in with a verdict in the meantime. I don't anticipate they will.

(Recess.)

(6:30 p.m., in open rourt, jury present.)

THE COURT: Ladies and gentlemen, it seems to me about time for a little sustenance. So I'm going to send you out to dinner with the marshal.

Of course, when you go to dinner the marshal is with you at all times and the marshal is no more entitled to know what you are thinking than I am or the defense counsel. So don't discuss the case or anything about the case while you are out of the jury room.

Have a good dinner. The marshal will bring you back when you are through. "

(At 6:30 p.m. the jury retired for dinner.)

THE COURT: For the record, the Forelady just asked me whether it was possible to bring in a verdict as to one defendant first and then as to the other. I said it was preferable that they tried to do them both at the same time. That was the gist of the conversation.

All right, ladies and gentlemen.

(8:15 p.m., in the robing room.)

MR. LONDIN: Your Honor, I respectfully request the Court instruct the jury as follows:

One, if you do not believe the testimony of Kilduff, you must acquit Mr. Anderson.

Two -- I, of course, request that both be given,

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but if your Honor does not want to give both, of course I

THE COURT: Less unhappy, shall we say.

MR. LONDIN: That is correct, sir.

will be happy with one without waiving my rights to innocence

Two, you may not convict Mr. Anderson on the basis of the Fund of Letters transaction unless you find beyond a reasonable doubt that, (a), it was falsely recorded and kept at the insistence of Mr. Anderson or the instance of Mr. Anderson to be filed with the SEC and, (b), it was done by him as part of an illegal agreement with at least one of the other conspirators to make, keep and file false records.

In other words, it is not enough to convict Mr.

Anderson if you find only that there was a conspiracy
between others with respect to transactions in which he
did not participate and that Mr. Anderson knowingly
caused false records to be made, kept and filed without
agreeing with one of the other named conspirators that it
be done. That is not enough.

I think it might be helpful that it be a Court Exhibit, too.

THE COURT: You can make that a Court Exhibit.

(Court's Exhibit 10 marked.)

THE COURT: Without passing on whether and to what extent I have incorporated those requests in my car, I don't think they are timely now. I have never instructed the jury after the case has been put to them as to anything unless what they request.

MR. LONDIN: My request is motivated by their last two questions. I think that makes this particularly pointed and timely.

THE COURT: I don't think it is sufficiently germane to their requests.

(Recess.)

(9:50 p.m. a note received from the jury.)

(Note marked Court's Exhibit 11.)

(In open court, jury absent.)

THE COURT: The question is, "Does knowing about the conspiracy and knowing its purpose imply being a member of the conspiracy?"

Bring the jury in.

MR. LONDIN: I renew my request that your Honor give the instruction I made before, the suggestion.

(Jury present.) .

THE COURT: Ladies and gentlemen, the question I have here, which is marked as Court's Exhibit 11, "Does knowing about the conspiracy and knowing of its purpose

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imply being a member of the conspiracy?"

Well, the answer to that question is no.

I can remind you of the illustration I gave of
the bank teller, in the one case where he was a member and
the other case where he wasn't. In the case where he wasn't
a member of the conspiracy he clearly knew about it and he
knew its purpose, but he wasn't a member. That illustrates
the answer is no.

What you need for membership of the conspiracy is not only knowledge but a knowing and wilful intention to participate in accomplishing the results, the unlawful results, of the conspiracy, plus activity in furtherance of that result.

Of course activity in the peculiar circumstances that I defined them to you as in relation with that bank teller, the one who was a participant, can be purposeful silence under the peculiar situation as the one I stated.

Does that answer your question?

THE FORELADY: May I ask something or would it have to be in writing?

THE COURT: You can ask.

THE FORELADY: Would knowledge of the conspiracy and knowledge of its purpose and wilful silence --

THE COURT: Wilful silence --

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THE FORELADY: I mean silence with a purpose, not necessarily a positive act.

THE COURT: Wilful silence, that is only a, of the conspiracy if it was planned by the conspirators. I mean, for example, take my illustration of the bank teller. If he happened to be a member of the conspiracy, just by hypothecation, and he knew all about it and he just happened to be there, it wasn't planned that he was there and he happened to be there and he happened to see things going on and he did nothing, that wouldn't be an act in furtherance of the conspiracy.

To be an act in furtherance of the conspiracy
it has to have been planned for him to be there. Mere
happening upon some information and keeping silent about it
would not be an act in furtherance of the conspiracy.

To be an act in furtherance of the conspiracy -- silence must be a planned act.

For example, in this kind of situation one of the other conspirators would have had to have known he was going to be in some situation where speech was going to be required of him. This would have to be a matter considered by the conspirators or one or more of them.

He would have to have planned to be in such and such a place and keep silent in such and such a situation. It

139a Jury's Request for Further Instruction 1 gwrf 11 3084 2 can't be just a haphazard thing, where he happens to come 3 upon some information and not say or do anything about it. 4 It would have to have been a planned act. Silence can be 5 an act. It has to be planned in order to be an act. 6 It is 10:00 o'clock, which is the time I normally 7 send people home. Do you feel it would be useful to stay 8 a little longer? The limousines are here, so they are 9 available. 10 Do you want to consider a little while whether 11 you should go home now? 12 THE FORELADY: I think there is no question we 13 should go home now. 14 THE COURT: Okay. I will confer with counsel for 15 a moment. 16 (At the side bar.) 17 MRS. PIEL: At the expense, your Honor, of 18 repeating myself, I think again we omitted that all important 19 word of agreement. 20 THE COURT: They didn't ask me about agreement. 21 MRS. PIEL: I'm only saying you feel it is impor-22 tant that that factor be added. 23 THE COURT: Okay. 24 MR. LONDIN: I would except to that much of your

Honor's charge which does not tell the jury that they must

agree that the defendant will go there and be silent and that must be a purposeful act in furtherance of the conspiracy.

THE COURT: I said that very thing.

MRS. PIEL: I said agree to the conspiracy originally.

THE COURT: I understand.

MR. LONDIN: By virtue of the jury's repeated guestions on this, it indicates their lack of awareness of what your Honor has sought to tell them.

One further thing. The jury has been deliberating for more than nine hours. I would respectfully request that they be discharged and a mistrial declared.

THE COURT: No, I don't think it is time for that yet.

MR. LONDIN: Alternatively I would ask whether they feel they can reach a verdict if they come back tomorrow. If they say they cannot reach a verdict, I ask that they be discharged and a mistrial be declared.

MR. FEINBERG: I want to mention in the record when your Honor says that the silence has to be planned, that is precisely what we are talking about here. That is the issue, and you have explained that ad nauseum to the jury.

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THE COURT: All right.

(In open court.)

THE COURT: It seems to me a technicality. I think I said it in substance.

Bear in mind everything I told you. A conspiracy is an agreement. It had to have been planned, it had to have been planned in pursuance of the agreement. That is what you have to find.

The act of silence, let me put it that way, was planned in pursuance of the original agreement to conspiracy or carrying out of the agreement. I don't mean to say when the conspiracy started they had to have planned everything, but once the conspiracy has started, each act has to be a conscious furtherance of the original plan and agreement in order to constitute an act in furtherance of the conspiracy, in order to constitute evidence of the existence of an agreement so far as that particular individual is concerned.

I gather all of you think that.

THE FORELADY: All of us don't think any one thing.

THE COURT: All of you think at least you want to go home.

THE FORELADY: Yes.

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THE COURT: I would think 10:00 o'clock tomorrow morning would be a suitable time for coming back.

Bear in mind that not so long ago it was not permissible to discharge a jury in the midst of its deliberations, the theory being it was too dangerous to permit them to get talking to other people. Some judges still take that view.

In some cases I have adopted the view of sequestering a jury once they start their deliberations.

I have more faith in the jury system than that. I believe that jurors can follow the instructions and do follow the instructions of not to talk to anybody about the case at your respective homes or wherever. Don't mention anything. The trouble with starting any kind of a conversation no matter how innocuous it may seem, you never can tell what the other person is going to say. There is no way of shutting them off frequently.

Don't say the name of the judge you are before, the name of the lawyers, the name of the people. Don't say anything that can trigger a conversation. It is best to avoid conversation. You can never tell what the other person is going to say and how it is going to come out.

Another thing, don't talk with each other.

You will be divided up being taken home. The whole theory

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of jury service, jury deliberations, is it is a unit, it is a deliberative body. If you start breaking up and go off physically separate and you start talking to each other, the first thing you do is to start forming little cliques and committees. That is not good.

Don't say anything about the case to each other or to anybody else obviously, but to each other also, until you reassemble in the jury room tomorrow morning. When there are 11 of you there, don't say anything until the 12th gets there. You can talk about other things, not the case, until you are all reassembled. There is no need of coming into court, just go into the jury room and when the 12th of you gets there, when you are all assembled, just resume your deliberations as though you had not been separated.

If you want any more information, send in a note.

THE FORELADY: Can we get a copy of what you have been saying?

THE COURT: You can have it repeated tomorrow morning.

THE FORELADY: Your definitions, we sit there and argue, did he say this or did he say that.

THE COURT: You can always have the reporter read it back tomorrow morning.

THE FORELADY: Sure. Thank you very much.

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United States of America

VS

Carl W. Anderson and John J. Villani

New York, New York
April 30, 1975-10:30 a.m.

(In open court, jury present.)

THE COURT: Good morning, ladies and gentlemen.

I trust you find yourselves refreshed.

Your foreman asked me two kind of off the record questions yesterday to which I gave knee-jerk reactions which aren't -- I will illustrate why we have juries instead of judges with trained minds.

The foreman asked me whether you could bring in separate verdicts: When you get finished with one case, then go back to the other. My knee-jerk reaction was no because that is not the way it is usually done.

There is no reason in the world why it shouldn't be done that way if you want to. As I told you these are two lawsuits.

Normally juries finish one lawsuit and then go on to the other and report their verdict on both. However, if you think it would clarify your thinking to decide, well, we are going to decide on lawsuit first and get that decision out of the way and then come back and go to the

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You have heard Mr. Feinberg's summation as to

The other question the foreman asked me, forelady, did I want to know how you stood numerically. I said no.

That's perfectly accurate. I don't want to know.

lawsuit, there is no reason in the world you should not do

If you want me to know, then I do want to know.

I mean, I didn't mean to be rejecting the information

if you want to give it to me.

Bear in mind I don't want to know who is ahead.

That is for sure. If for any reason you think it would help -- my function is to try to help you come to a verdict if I can without in any way interfering with you.

If I in any way interfere with the manner in which you come to a verdict or the verdict you come to, then I'm not doing my job. If you think I can help you facilitate your deliberations in any way without interfering with them, if you think it is helpful to ventilate whatever your numerical thing is, so long as you don't indicate who is ahead, that's up to you. It just occurred to me there was so many questions about this business of knowledge and silence. Maybe it would be helpful now that we have all had a good night's sleep, including me, if I just restated it.

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the importance of Mr. Anderson's supposed power in the firm and all that, all of which is perfectly relevant for you to consider on the issues in which Mr. Feinberg asserted them, the likelihood he knew what was going on, all that. You heard those arguments. Those are his arguments.

However, mere power to stop something doesn't make you a conspirator.

In the illustration I gave you from the bank teller, that bank teller had absolute power to stop that conspiracy dead in its tracks, and on the supposition I gave you, he decided, because his brother was involved, he didn't want to stop it in its tracks. I told you he might be delighted his brother was going to get a lot of money, it was fine for his brother, so he didn't exercise his power to stop it in its tracks.

If he was a member of the conspiracy and he was in on it and he knew and the conspirators knew, unless he was at his post and maintained his silence and the conspiracy would not succeed and he was there for the purpose of maintaining his post and maintaining his silence, therefor, avoiding suspicion and whatnot, and letting the conspiracy succeed, if that was his purpose and the conspiratorial purpose -- it can't be just his purpose --

Exceptions to Probable Inferences by Jury 3093 gwrf 4 1 it has to be part of the plan. If it is part of the 2 plan and he is there. for that purpose, then his silence 3 can be part of the conspiracy. The mere fact that he 4 may be the president of the bank and let's the conspiracy 5 go on doesn't make him a member of it just because he says: 6 It's fine, my brother needs more money, let him rob the 7 8 bank, great idea. If he is not a part of the conspiracy, silence, 9 he has no obligation to try o stop it. 10 If what he does is intended by the conspirator 11 12

to facilitate it, then silence can be an overt act in pursuance of the conspiracy.

I think I have made it clear. It won't be the first time I was wrong on that issue. If it isn't clear, don't have any hesitancy in coming back.

I'll have counsel at the side bar.

(At the side bar.)

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MRS. PIEL: There are two exceptions I wish to take at this time. First of all, I don't think that they may infer, from silence, agreement, and I don't think that has been said to them really at any time. They may not infer.

In other words, many of the things you were talking about had to do with the fact that, they were

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Exceptions to Probable Inferences by Jury
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going to infer samething. So they may not infer from
silence --

THE CCURT: I didn't say anything like that.

MRS. PIEL: I say they were not expressly

told they could not infer from silence any agreement in
the conspiracy.

Secondly, again I wish to except to the absence of any kind of concept of agreement.

THE COURT: They weren't asking about agreement.

MRS. PIEL: Wust so I may make clear what I'm saying, your Honor, is the use of the word. If a person is part of the conspiracy, then he is charged with whatever is already, jumping to the conclusion because what they have to determine is whether or not the person is part of the conspiracy. The only way they can determine it is to ask themselves the question of whether or not the person who is charged with being a member of the conspiracy agreed to so participate.

THE COURT: Ckay.

Mr. Londin.

MR. LONDIN: Your Honor, I would except to that portion of your Honor's charge which deals with joining a conspiracy by silence. I agree with Mrs. Piel.

THE CCURT: I didn't say joining it by silence.

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MR. LCMDIN: However your Monor put it.

THE COURT: Don't say something I didn't do.

MR. LONDIN: I don't mean to do that, sir.

I agree with Mrs. Piel, all of what she said, and particularly that portion in which she asked your Honor to instruct the jury that you may not infer joining a conspiracy by silence. There must be an expressed agreement.

I would point out to your Honor --

THE COURT: I don't think that's necessarily true, that you may not infer it. You may infer from the act that it must have been deliberate.

MR. LONDIN: There is no testimony whatsoever on which basis the jury can conclude that there was a conspiracy of silence. The record --

MR. FEINBERG: That's wrong.

THE COURT: You can argue that.

MR. LONDIN: One additional thing. I had been informed by your Honor's clerk that that proposed instruction would be marked as part of the record and submitted at 9:45.

THE COURT: This is Court's Exhibit 12.

(Court's Exhibit 12 marked.)

the form (Court's Exhibit 12 was submitted

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to the Court in chambers at 9:45.)

MR. LONDIN: I would ask your Honor to charge those portions in that recuest which your Honor did not cover.

THE COURT: I think they have been covered otherwise.

MR. LONDIN: Thank you.

(In open court.)

THE COURT: I just want to point out -- I was merely addressing myself to your questions about silence.

I wasn't intending in any way to qualify everything else

I have said about the necessity of agreement and everything else.

I'm just answering that specific question.

THE FORELADY: Thank you, your Honor.

THE COURT: Continue with your deliberations.

(At 10:45 a.m. the jury returned to the jury room to continue their deliberations.)

(Recess.)

(At 11:05 a.m. a note was received from the jury.)

(At 11:30 a.m. a note was received from the jury.)

(Notes marked Court's Exhibits 13 and 14.)

(In open court, jury absent.)

THE COURT: I have here two communications from the jury, Court's Exhibits 13 and 14.

1	gwrf 8 3097
2	Court's Exhibit 13 says, "Minutes of executive
3	committee meeting at which Goodbody report was discussed
4	and vote 3-3-1 was taken."
5	Then 14, "If minutes we just request are not
6	available, may we have read to us Goodbody's recollection
7	of the meeting, specifically of the vote for and against

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Goodbody's recollection of the meeting will be one thing, but this didn't happen at the meeting.

MR. FEINBERG: That's right.

the dismissal of Eucker?" ,

THE COURT: His recollection of the vote for and against Mr. Ducker was a conversation he had with Mr. Sloan after the meeting.

MRS. PIEL: He wasn't sure of it.

THE COURT: Whatever the minutes are, they are. Will you two get the minutes?

MR. FEINBERG: The transcript. There are no minutes.

MRS. PIEL: There are two --

MR. FEINBERG: That

MRS. PIEL: May I put this on the record?

I only want to call the Court's attention to the fact that in the March 20th minutes of the general partnership meeting there is on page 3, Mo. 5, the

statement that Pim Goodbody is continuing his study of home operations.

THE COURT: That has nothing to do with this one.

MR. LONDIN: I believe that is Government's

Exhibit 4.

MRS. PIEL: The other is Government's Exhibit

61, which was subsequent to the meeting with the executive

committee, which makes reference and it says operations study.

It is on page 4 of Exhibit 61. "FMS reported that Pim

Goodbody consultant had completed his study of the operations

department and that the report was available for review by

all partners."

THE COURT: That doesn't have anything to do with this question.

MRS. PIEL: It has this thing to do with it, your Honor. There is reference in the minutes --

THE COURT: But that's not what they are asking for. They are asking for the minutes of the discussion --

MRS. PIEL: One of the problems is -- I would hate them to infer from the fact that we say there are no minutes --

THE COURT: They couldn't possibly draw that inference. They asked for the minutes of a specific discussion. I'll tell them there are no minutes of that

The first one 13, "Minutes of the executive

committee meeting at which Goodbody report was discussed

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and voted 3-3-1 was taken."

Then you anticipate the answer to that question with your next note, "If minutes we just requested are not available, may we have read to us Goodbody's recollection of the meeting, specifically of the vote for and against the dismissal of Eucker."

There are no minutes in evidence of the meeting itself.

As to the second question, Goodbody's recollection of that vote. The vote was not taken, if it was taken at all, while he was present. He merely reported a conversation he had had with Sloan about that vote. Counsel have agreed upon what is an appropriate answer to your second question and you will now hear that read. If it isn't what you want to know, just let us know.

THE FORELADY: Could you wait a minute while
I find out whether they want more than that?

THE COURT: Wait until you hear what counsel have agreed on. If you want more, you can say so.

All right, proceed.

(Record read.)

THE COURT: Is that what you wanted to hear, ladies and gentlemen?

THE FORELADY: Yes. Thank you.

THE COURT: All right.

Resume your deliberations. The marshal either will or has been in to order for lunch.

(At 11:55 a.m. the jury returned to the jury room to resume their deliberations.)

MR. LONDIN: Your Monor, at this time I renew my motion that the jury be discharged and a mistrial granted. I believe they have had sufficient time to deliberate, they were out for over nine hours yesterday, they have been out since 10:00 o'clock this morning.

THE COURT: Unless you inform me to the contrary, I will assume you continue your position.

MR. LCMDIN: All right, sir. I have a continuing request for that.

THE CCURT: You have a continuing request for that unless you change your mind and inform me to the contrary.

MR. LONDIN: Thank you, your Honor.

THE COURT: Mrs. Piel, do you want to go along with Mr. Londin's request?

MRS. PIEL: No, I don't.

(2:15 p.m.)

(In open court, jury present.)

THE COURT: Will you poll the jury.

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THE CLERK: Ladies and gentlemen of the jury, please answer as your name is called.

(Jury roll called - all present.).

BY THE CLERK:

- Q Madam Forelady, has the jury agreed upon a verdict?
- A Yes, we have.
- Q What is your verdict as to the Defendant Carl W. Anderson on Count 1?
 - A Guilty. ,
- Q What is your werdict as to the Defendant Carl W. Anderson on Count 2?
 - A Not guilty.
- Q What is your verdict as to the Defendant John J. Villani on Count 1?
 - A Not guilty.

MR. LONDIN: Would your Honor poll the jury, please.

THE COURT: Before the clerk polls the jury,

I have a message from the Forelady which asks do I want

any recommendation as to degree of guilty.

You said some jurors wanted to give it and some didn't. My answer was no. I just want to be certain as to the polling of the jury that no person voting for a verdict of guilty has any reservations on the basis

Verdict gwr ! 14 3103 that they wanted to say something about the degree. I want to make sure that the vote of quilty is a vote 3 of guilty without reservation. THE FCRELADY: I think so. Our question about 5 the recommendation came up after the vote. 6 THE COURT: All right. 7 8 Poll the jury. 9 THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded: 10 You say you find the Defendant Carl W. Anderson 11 guilty on Count 1, not guilty on Count 2. 12 (All jurors, upon being asked by the clerk, "Is 13 that your verdict" answered in the affirmative.) . 14 THE CLERK: The jury is polled, your Honor. 15 THE COURT: You have no further motions that 16 need the presence of the jury. I take it. 17 Ladies and gentlemen, it is never my practice 18 to comment on the verdict. It was not my concern before 19 the verdict and doesn't become my concern after the verdict. However, I cannot refrain from commenting upon the 21 obvious diligence with which you approached your task. 22

Mr. Anderson I am sure does not like the verdict, but

I'm sure, equally sure, it will be easier for him to

live with because of the obvious care and concern which

24 25

he saw you give your task, and I'm sure it is an easier thing to live with when you know whatever the result was, it was the result of care and conscientious work.

Now, ladies and gentlemen, it is awfully easy to say what important work you do and all that. Really and right down to the bottom line I think jury service is about as important and exacting work that a layman can be called upon to perform, at least in peacetime. I just hope that you barry with you the satisfaction which should result from the feeling of difficult work conscientious performed.

You are excused with the thanks of the Court.

THE FORELADY: We would like to thank you.

We all felt we got an education.

(Jury excused.)

THE COURT: Mr. Londin, do you want to save your motions until the time of sentence?

MR. LONDIN: Yes, your Honor. I would ask that the defendant be continued on his own recognizance.

THE COURT: I assume there is no objection.

MR. FEINBERG: No objection.

(Pause.)

MR. FEINBERG: There is a date for sentencing, your Honor, for the others.

160a Colloquy Re Sentencing

1	gwrf 16 3105
2	THE COURT: Have the others been set down?
3	THE CLERK: They were set down for May 15th.
4	MR. FEINBERG: Perhaps we should put the others
5	over.
6	(Pause.) ·
7	THE COURT: June 16th, is that agreeable?
8	MR. FEINBERG: Yes.
9	THE COURT: Is that all right with you. Mr.
10	Londin?
11-	MR. LONDIN: Yes.
12	THE COURT: We are in Part I. We better make
13	it in the afternoon, 2:00 o'clock.
14	MR. LONDIN: That's what room, sir?
15	THE COURT: 506.
16	I think counsel for all sides are to be con-
17	gratulated on the work they did.
18	Mr. Villani, you are discharged.
19	(Trial concluded.)
20	
21	

161a POST-TRIAL MOTION (RULES 29(c) AND 33)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

74 Cr. 859 (WK)

UNITED STATES OF AMERICA,

- V -

: NOTICE OF MOTION FOR JUDGMENT OF ACQUITTAL

CARL W. ANDERSON, et al., : UNDER RULE 29(c) AND,

ALTERNATIVELY, FOR A

Defendants. : NEW TRIAL UNDER RULE 33

SIR:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Jerome J. Londin, sworn to June 9, 1975, and upon all the proceedings heretofore had herein, a motion will be made before the Jon. Whitman Knapp, District Judge, on June 16, 1975 at 2 P.M. in the United States Courthouse, Foley Square, New York, N.Y., for an order: (1) pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, setting aside the verdict of guilty against the defendant Anderson and entering a judgment of acquittal; (2) if judgment of acquittal not be entered, granting him a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure; and (3) granting him such other and further relief as may be just and proper.

Dated: New York, N. Y. June 9, 1975

Yours, etc., CARRO, SPANBOCK, LONDIN, RODMAN & FASS

Marine of Fandin JEROME J. LONDIN A Member of the Firm

Attorneys for Defendant Carl W. Anderson 10 Fast 40th Street

New York, N. Y. 10016

TO: HON. PAUL J. CURRAN United States Attorney for the Southern District of New York One St. Andrew & 11575 . . .

AFFIDAVIT OF JEROME J. LONDIN IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, : 74 Cr. 859 (WK)

v -

. AFFIDAVIT

CARL W. ANDERSON, et al.,

Defendants. :

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

JEROME J. LONDIN, being duly sworn, deposes and says:

1. I represent the defendant Carl W. Anderson.

This affidavit is made in support of the annexed motion pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure for an order setting aside the verdict of guilty against

Anderson and entering a judgment of acquittal, and, if judgment of acquittal not be entered, granting him a new trial. The grounds for said motion are as follows:

INTRODUCTION

- 2. This motion seeks alternative relief. It seeks a judgment of acquittal under Rule 29(c) and, alternatively, if such relief be denied, a new trial "in the interest of justice" under Rule 33.
- 3. Rule 29 takes cognizance of the reality that jurors may not always be capable of applying strictly the

Affidavit of Jerome J. Londin in Support of Motion instructions of the Court, nor of basing their verdict entirely upon the evidence developed at the trial.

- 4. Rule 33 provides in the most general terms that the trial court may grant a new trial to a defendant "if required in the interest of justice." This part of Rule 33 is broader in scope than the part dealing with newly discovered evidence. Benton v. United States, 188 F.2d 625, 627 (D.C. Cir. 1951). Generally, any error in the trial which could be raised on appeal may be raised on a motion for a new trial.
- 5. There is no incongruity or inconsistency in requiring the Court to submit the issues to the jury if there is substantial evidence to support a verdict of guilty and at the same time empowering it to set the verdict aside if it is deemed contrary to the weight of the evidence. In directing a judgment of acquittal under Rule 29(c), the Court makes a final disposition of the case. On the other hand, in setting the verdict aside under Rule 33, the Court merely grants a new trial and submits the issues for determination by another jury. It is appropriate that in the latter instance, the Court should have wide discretion in the interests of justice. See United States v. Robinson, 71 F. Supp. 9, 10-11 (D.D.C. 1947); see also United States v. Shipp, 409 F.2d 33, 36-37 (4th Cir. 1969).

Affidavit of Jerome J. Londin in Support of Motion
6. Because the verdict is contrary to the weight
of the evidence, judgment of acquittal should be entered. At
the very least, a new trial should be granted in the interests
of justice. If Rules 29 and 33 are ever to be given any
meaningful expression, it is now, lest there be a miscarriage
of justice and an innocent man be imprisoned.

REASONS FOR GRANTING THE MOTION

- 7. There was no proof that Anderson participated in a conspiracy to keep false records in order to facilitate false filings with the S.E.C. There was simply no testimony -- not even from Kilduff -- that the filing of a false report with the S.E.C. was ever within Anderson's contemplation. On what proof then should this conviction, with its dire consequences of imprisonment and disgrace be allowed to stand?
- 8. To begin with, there was a total failure of proof that Anderson conspired to file any false report with the S.E.C. Indeed, he was acquitted of the substantive count, notwithstanding a <u>Pinkerton</u> instruction (3069-9) from which a conviction on the substantive count would have followed, had the jury believed Anderson guilty of conspiring to file any false document with the S.E.C. Not even Kilduff said Anderson told him to make false records for inclusion in a report to the S.E.C.
- 9. Moreover, not even Kilduff said Anderson told him to make false records at all. And, according to Kilduff,

Affidavit of Jerome J. Londin in Support of Motion when he told the Executive Committee what he had done, Anderson and Villani and Eucker were invariably present -- even when Eucker was in India and Anderson was also out of the country.

In view of Villani's acquittal, Kilduff having invariably placed them together when he claimed to have mentioned his record keeping, the jury rejected Kilduff's testimony.

- 10. Did the jury convict Anderson because of the prosecution's erroneous and untrue argument to the jury that Anderson was "the lord high overseer", responsible for "defrauding . . . the New York Stock and the investing public [of] over four million dollars" (Opening, 4/3/75, meh 1, 19)?
- 11. Did the jury convict Anderson because the prosecution, beginning with its opening and through the trial, unnecessarily, repeatedly and prejudicially linked Anderson with Vesco in the Fund of Letters transaction*? This transaction

^{*&}quot;Very important, ladies and gentlemen. I have mentioned to you how Fergus Sloan was the major contact with Rick Clinton. This man, ladies and gentlemen, Carl Anderson, was the major contact with Robert Vesco and International Controls Corporation. It was through Mr. Anderson's efforts that Robert Vesco comes into Orvis Bros. and lends Orvis Bros. \$500,000.

[&]quot;The evidence will show, ladies and gentlemen, that Carl Anderson wore two hats: major partner of Orvis Bros., a director sitting on the board of International Controls Corporation.

[&]quot;The evidence will show that Carl Anderson had every reason in the world to see to it that that trade of ICC stock with the Fund of Letters went through and had every reason to see it that that account was not closed at Orvis Bros. after seven days.

[&]quot;The evidence will show that Carl Anderson made attempt after attempt after attempt to get that business deal worked out

Affidavit of Jerome J. Londin in Support of Motion was charged in the indictment and set out in the bill of particulars as part of a conspiracy to violate Reg. T.*

for months and months and months, but all that time that account sits in the books and Carl Anderson even goes out to California with Robert Vesco to try to get that deal closed, but no one else from Orvis Bros. goes out to California with them.

"Two hats, ladies and gentlemen" (Opening, 4/3/75, meh 20-1).

*The Assistant United States Attorney (who was not the trial attorney) obtained the indictment and resigned the next day, I have been told. His grand jury interrogation of Dennis J. Duffy on July 31, 1974 (Gov. Ex. 3533 id.) clearly establishes his ignorance of and misadvice to the grand jury concerning Reg. T. At Gov. Ex. 3533 id., pp. 48-50 (the first page of the transcript is numbered p. 39), the prosecutor questioned Duffy about the partially secured customers' accounts with outstanding debits, including Martin, Bozeman and Fund of Letters (p. 48), as follows:

"Q. Did you have any discussion with anyone concerning these accounts in which there were debit balances regarding possible REG-T violations?

"A. No, sir.

"Q. Do you know what a REG-T is?

"A. Specifically, no; so you had better tell me.

"Q. You have debit balances in certain accounts, customer accounts, which can be used as good capital for a certain period of time of upwards to thirty days, but thereafter certain balances should not be used in computing a firm's capital position.

"A. You said debit balance?

"Q. Yes.

"A. No, I did not know that."

Affidavit of Jerome J. Londin in Support of Motion
In dealing with the allegation of False records, the indictment
and the bill of particulars mention various matters, but never
the Fund of Letters transaction. Nevertheless, realizing in
mid-trial that it was not a Reg. T violation, the prosecution
for the first time and over objection changed its theory, in
effect re-wrote the indictment, and charged it as part of the
conspiracy to keep false records.

- 12. First of all, Anderson had nothing to do with the mechanics or even the instructions pursuant to which this 1968 transaction was recorded on Orvis' books under customers' cash accounts -- where it indeed belonged at the time. There was no testimony that Anderson at any time thereafter, when it became a disputed trade, discussed with anyone the place where the transaction should be recorded. Indeed, the prosecution established that at first Anderson discussed the transaction with no one at all, and that later the entire firm was aware of it and was after him. On the one occasion Kilduff claimed to have said -- in the presence, inter alia, of Musal and Villani and Anderson (who all denied it) -- that the four problem accounts (Bozeman, Martin, Aquarius and Fund of Letters) were not being charged against capital, Kilduff said: "I don't recall him [Anderson] saying anything at that particular meeting, sir" (309-10).
- 13. Indeed, when Haskins & Sells was told of it during the August 1969 audit, they made no change in the

Affidavit of Jerome J. Londin in Support of Motion accounting treatment except to have Orvis double its reserve for uncollected customers' accounts. Vayda knew of the four accounts -- Fund of Letters, Bozeman, Aquarius, and Martin -- and that they were carried as cash accounts, notwithstanding the fact that they "were, as we called it, in deficit, partly secured" (1327). Kilduff told Vayda "this was one of the exposure areas of Orvis Bros." (1328). Haskins & Sells took this into account and, after doubling the reserve, "left them [the four accounts, including Fund of Letters] in 'cash accounts'" (1328).

- joined the conspiracy to file a false report with the S.E.C.

 For that matter, when in December 1969 the N.Y.S.E. examiners disagreed with the Haskins & Sells accounting treatment of these accounts, the Exchange permitted Orvis to operate as before, even though the resultant charge against capital put Orvis out of ratio.
- 15. According to Mezzetta's report dated Dec. 19,
 1969 about the Special Executive Committee meeting of Dec. 18,
 1969 concerning the N.Y.S.E. examiner's report (Def. Ex. AT;
 Gov. Ex. 144, which contains only the first of the two pages),
 as of Dec. 1, 1969 Orvis' ratio was 22.52 to 1, and "if OB had
 to absorb all of the short positions, our A.I. would be 28.04
 to 1."

Affidavit of Jerome J. Londin in Support of Motion 16. At its examination in early December 1969 the

N.Y.S.E. examiners questioned the four problem accounts -- Martin, Aquarius, Bozeman and Fund of Letters (Def. Ex. A; Gov. Ex.). Accordingly, the Nov. 30, 1969 recomputation of net capital showed a ratio of 22.52 to 1, and the Orvis answers to the N.Y. S.E. special questionnaire as of Dec. 31, 1969, taking the four accounts as a charge against capital, reported a capital ratio of 3619% (Def. Ex. J). The Exchange did not close Orvis' doors.

17. The overwhelming proof negated any conspiracy concerning the Fund of Letters trade. Yet from the jury's general verdict of guilty on the conspiracy count, we cannot say it was based on something other than this trade. See page 3102, where the jury asked whether the Court wished "any recommendation as to the degree of guilty". We do know that the jury had difficulty with the legal import of Count 1:

"THE FORELADY: Your Honor, is there any way in which you can put in a short or simple sentence the substance of Count 1 of the indictment? You know there are pages and pages of it are if I try to ask people to vote on Count 1, is there any way of putting it in a nutshell? Do you see what I mean? Count 2 is on one page and I think I can probably put a question on Count 2, but Count 1 goes all over the place" (3072).

18. After the Court answered by referring the jury to its original instructions (3072-3), the jury retired at 3:05 p.m. (3073). At 5:45 p.m. the jury asked:

"If there was a conspiracy consisting of several parts and a defendant knew of only one part, does he thereby have knowledge of the conspiracy?" (Ct. Ex. 9; 3074).

170a Affidavit of Jerome J. Londin in Support of Motion

19. The Court's answer (3074-6) did not dispel the confusion, and the forelady asked:

"If there are several items in this false report and a defendant knows of one, does he know of the conspiracy?" (3076).

- 20. The Court answered, and defense counsel took exception on the grounds that: there must be an agreement; a defendant "must do some affirmative act . . . must take some action evidencing his agreement"; and that "the objective of the conspiracy was to file this false report [the Haskins & Sells report as of Aug. 31, 1969, filed on Oct. 16, 1969]*

 (3076-7).
- 21. The Court, after noting an exception to defense counsel (3077), heard the prosecution say: "I don't think one more word should be said", and answered the jury's question, in a manner which denied the defense requests** (3077-8).

^{*}It was only this overt act, charged in the substantive count on which Anderson was acquitted, which kept Count I from being barred by the Statute of Limitations. This defense was raised on Anderson's motion to dismiss the conspiracy count, which the Court denied.

^{**&}quot;. . . everything I have said is qualified by everything I have said before, there must be an agreement, everything . . . I wasn't taking away anything of what I said before as to the necessity of agreement, wilfulness, acts, everything."

Affidavit of Jerome J. Londin in Support of Motion
22. The jury then deliberated from 6:00 p.m. until
they retired for dinner at 6:30 p.m. (3078-9). Because of the
jury's two questions (Ct. Ex. 9, 3074, 3076; see pars. 18, 19,
supra) asked shortly before the recess (3081), during the dinner
recess defense counsel prepared and at the first available
opportunity requested the following instructions to the jury:

"MR. LONDIN: Your Honor, I respectfully request the Court instruct the jury as follows:

"One, if you do not believe the testimony of Kilduff, you must acquit Mr. Anderson.

"Two -- I, of course, request that both be given, but if your Honor does not want to give both, of course 1 will be happy with one without waiving my rights to innocence upon the other.

"THE COURT: Less unhappy, shall we say.

'MR. LONDIN: That is correct, sir.

"Two, you may not convict Mr. Anderson on the basis of the Fund of Letters transaction unless you find beyond a reasonable doubt that, (a), it was falsely recorded and kept at the insistence of Mr. Anderson or the instance of Mr. Anderson to be filed with the SEC and, (b), it was done by him as part of an illegal agreement with at least one of the other conspirators to make, keep and file false records.

"In other words, it is not enough to convict Mr. Anderson if you find only that there was a conspiracy between others with respect to transactions in which he did not participate and that Mr. Anderson knowingly caused false records to be made, kept and filed without agreeing with one of the other named conspirators that it be done. That is not enough" (3079-80; Ct. Ex. 10).

^{*}The word "innocence" should read "insist."

Affidavit of Jerome J. Londin in Support of Motion
23. The Court refused the request on the grounds it
was not timely and not sufficiently germane (3081). An hour
and a half later the jury was back with this question:

"Does knowing about the conspiracy and knowing its purpose imply being a member of the conspiracy" (3081; Ct. Ex. 11).

- 24. Defense counsel renewed his prior request for instructions (3081). The Court's answer, which repeated its original illustration of the silent bank teller (to which defense counsel had originally taken exception), satisfied neither defense counsel nor the jury, the jury asking about:
 - ". . . knowledge of the conspiracy and knowledge of its purpose and wilful silence . . . silence with a purpose, not necessarily a positive act" (3082-5).

The requested instruction concerning the Fund of Letters trade was never given.

25. Did the jury convict Anderson because the prosecution incorrectly claimed a vast fraud by Orvis, with Anderson as "lord high overseer", on the investing public by means of hypothecation of customers' securities? According to the prosecution, "there were seven distinct ways the books were juggled" by " these men [Anderson and Villani]" and "the three others [Kilduff, Sloan and Eucker]" (Opening, 4/3/75, meh 6). The prosecution's opening and its evidence during the trial -- Vayda, Soffler and Netelkos-*ressed the allegedly improper

Affidavit of Jerome J. Londin in Support of Motion hypothecation and loans (which latter violation was not charged), amounting to anywhere from \$7,482,000 (Gov. Ex. 74) to over \$10,000,000 (1987), depending upon whether it was on Aug. 31, 1969 or the end of April 1970.

26. In opening the prosecution stressed the hypothecation of customers' paid for securities as the most successful of the seven ways the defendants effected the conspiracy to keep false records and file a ralse S.E.C. report. Although there was no relationship to any S.E.C. filing of the events in 1970, and the prosecution was apparently trying to show only that the false hypothecation record consisted of the entries in Gov. Ex. 74, Item 6G, reading: "Pledged in error (since corrected) . . . \$5,965,146" and "Loaned in error (since corrected) . . . \$1,517,205"* (2957), the opening and the prosecution's case stressed hypothecation into late April 1970 amounting to over \$10,000,000.

27. In opening the prosecution said:

"The seventh and last way, ladies and gentlemen, that this fraud is promoted was the most successful way and the evidence will show the most rewarding way from these defendants' point of view.

^{*}This latter item was not a hypothecation and was not charged in the indictment. Proof of it was admitted over objection.

174a
Affidavit of Jerome J. Londin in Support of Motion

"Orvis Bros. in 1969 and '70 took securities that they were holding for customers that were fully paid for, and used the customers' securities as collateral to get bank loans in various banks. These securities, the evidence will show, did not even belong to Orvis Bros.

"What these two defendants agreed to do was this: As the evidence will show, ladies and gentlemen --

"MR. LONDIN: May the record show that he was pointing at the two defendants on trial so it is crystal clear he said they did it.

"MR. FEINBERG: No, I said these two, Mr. Anderson and Mr. Villani agreed to do the following.

'MR. LONDIN: That's what I wanted the record to show, your Honor, he's made it clear.

"MR. FEINBERG: In the Orvis Bros. vault was millions of dollars in stock which belonged to Orvis Bros. customers. Orvis Bros., the evidence will show, kept this stock in their vault for sakekeeping. This customer stock was supposed to be segregated from any other stock because it belonged to customers, not to Orvis Bros. In 1969, 1970, faced with these debts and this financial crisis that I have explained in my opening to you here today to you ladies and gentlemen, these two men, Mr. Anderson and Mr. Villani, along with three other men, which we will get to in a moment, agreed to take these securities from the vault in Orvis Bros. and use them as collateral with banks to get loans totaling by August 31, 1969, seven million dollars.

"This is called, ladies and gentlemen, it is a long word, hypothecation: using fully paid for customers' securities to secure loans for a firm.

"In July of 1970, June and July of 1970, when the firm finally went under, the evidence will show that after all the assets were sold to pay off the debts that Orvis Bros. had incurred, the evidence will show that close to five million dollars in loans to these banks could not be repaid.

Affidavit of Jerome J. Londin in Support of Motion

"The result was, as the evidence will show, the New York Stock Exchange was forced to pay off these loans to these banks so that customers wouldn't lose their stock.

"These, ladies and gentlemen, were the seven ways that these two men agreed to hide the red and bleak financial picture of Orvis Bros. from the SEC" (Opening, 4/3/75, meh 15-17).

* * *

"Employees who worked in the vault will testify about the use of these customers' securities to get bank loans, and how they questioned Kilduff and Anderson about these acts and were simply told, stay out of it, mind your own business" (Opening, 4/3/75, meh 25).

- 28. The proof was to the contrary. Aside from having been reported in the Haskins & Sells report, the hypothecation of fully paid for customers' securities was not a subject of discussion at Orvis, and Kilduff never talked to Sloan, Anderson, Villani, or Eucker about hypothecation at Orvis (417).
- 29. Kilduff having negated any conspiracy involving hypothecation, the prosecution called Lanz, who confirmed that the hypothecations were Eucker's responsibility alone. No other co-conspirator was involved. Through Lanz the prosecution established that the "since corrected" entries (the individual and non-conspiratorial act of Eucker) were incorrect, and that Orvis was unable to release about \$2,500,000 of customers' securities (1131-4).* In addition, through Soffler the

^{*}Lanz did not specify whether these unreleased securities were part of the securities hypothecated or loaned or both (See par. 15, supra).

176a

Affidavit of Jerome J. Londin in Support of Motion prosecution introduced testimony and documents showing that from August 31, 1969 to mid-October 1969 hypothecation continued.

- 30. Why then was the prosecution permitted, over objection, through Vayda's testimony and documents to show the state of paid for but unsegregated customers' securities in its aborted audit as of May 3, 1970? Vayda said he participated in an audit of Orvis in May 1970 which was not completed (1344-6). Over objection that the May 3, 1970 figures were based on an uncompleted audit, not connected with Anderson, not shown to relate to the securities pledged as of Aug. 31, 1969, and did not show that the Aug. 31, 1969 figures were inaccurate (1346-8), the Court erroneously received the testimony and exhibits as "relevant on the question of whether the error in '69 was wilful" (1348-50), even though Vayda would not link his testimony or exhibits with Anderson or anyone else (1349).
 - 31. Over objection the prosecution then introduced Gov. Ex. 142, 'the draft [audit report] as far as you [Vayda] got." From Gov. Ex. 142 Vayda testified that as of May 3, 1970, \$6,532,000 of customers' securities were pledged in error and \$1,541,000 of customers' securities were loaned in error (1351).
 - 32. The prejudicial error was compounded by the testimony of Netelkos, whom the prosecution called for the sole purpose of burying Anderson. Whereas Vayda's figure was \$6,532,000 for pledged customers' securities, Netelkos (with

Affidavit of Jerome J. Londin in Support of Motion characteristic hyperbole) said that at the end of April (1980-2) the figure exceeded \$10,000,000 (1985-9). Netelkos said he got his figures from the records of Orvis.

- Since Netelkos claimed to have discussed hypothecation with Anderson, the severely circumscribed cross-examination of him was prejudicially erroneous. Although Netelkos was himself under indictment in a different federal case for illegal hypothecation shortly before his arrival at Orvis, and although Netelkos persisted in denying his complete control of Orvis in early 1970 when he claimed to have discovered illegal hypothecations there, defense counsel was not permitted to show through numerous documents the pervasive control Netelkos had of Orvis' daily business affairs, or to inquire into the substance of the pending hypothecation case against him (whose existence was elicited by the prosecution on direct examination) -- even though the brokerage firm involved was the vehicle for his involvement with Orvis in Manor Nursing Homes trades and other securities transactions. Cross-examination as to the details of his admitted complicity in Menor Nursing Homes was also curtailed. No cross-examination was permitted concerning sanctions imposed against him by regulatory agencies such as the N.A.S.D. and the S.E.C.
- 34. There was no proof that Anderson was responsible for the hypothecations. Indeed, the proof was to the contrary.

Affidavit of Jerome J. Londin in Support of Motion
There was no proof that in October 1969 Anderson knew the
"pledged in error -- since corrected" entry in Gov. Ex. 74 was
false. Anderson's knowledge (according to Netelkos alone) in
1970 of hypothecations in 1970 or in 1969 cannot establish the
"wilfulness" of any act by Anderson in 1969, there being no
proof whatsoever of any such act.* If his testimony was
admissible against Anderson on this theory, Netelkos should
have been fully cross-examined as to his activities at Orvis
and as to his other immoral acts, particularly those related
to the hypothecations he blamed on others.

35. The prejudice of the error in curtailing his cross-examination is emphasized by the jury's questions:

"If there was a conspiracy consisting of several parts and a defendant knew of only one part, does he thereby have knowledge of the conspiracy?"

* * *

"If there are several items in this false report and a defendant knows of one, does he know of the conspiracy?"

(3074-6; Ct. Ex. 9).

"More problems existed in regard to segregation since we are only permitted to use 140% of the adjusted balance of an account and in numerous instances the firm was using anywhere from 300% to 480% of adjusted debit balances." (Def. Ex. AT, p. 2, No. 4)

^{*}For that matter, on Dec. 19, 1969 all partners of Orvis were informed by Mezzetta's report of a Special Executive Committee meeting on Dec. 18, 1969 concerning the N.Y.S.E. examination of Orvis' records, which disclosed:

179a

Affidavit of Jerome J. Londin in Support of Motion
36. These questions and the Court's answers (to
which exception was taken) demonstrate the weight the jury could

place on Netelkos' testimony in finding knowledge by Anderson

of hypothecation as a predicate to his conviction.

37. In any case, for the reasons set forth in the three briefs of Anderson filed in support of the motion, the entire hypothecation issue should have been stricken, including all references to it in the conspiracy count, as requested in Anderson's pre-trial motion. In the absence of any proven violation of the applicable rule, Rule 8c-1 (17 C.F.R. §240.8c-1), the jury was erroneously told throughout the trial that many millions of dollars of customers' securities were illegally hypothecated, and the defense was barred from showing compliance with Rule 8c-1.

38. Moreover, although not charged in the indictment, the prosecution was permitted, in effect, to re-write the indictment at trial and to use the hypothecation issue to secure Anderson's conviction.

180a Affidavit of Jerome J. Londin in Support of Motion

barred and prolix indictment, hurriedly obtained on September 10, 1974 after a two and one-half year incubation period in the U.S. Attorney's office and less than a month before the statute of limitations ran out as to Gov. Ex. 74 (Form X-17A-5, filed Oct. 16, 1969)—the Court reduced Count 1 to the following issue: Did Anderson conspire to falsify Orvis' records in order to facilitate false reports to the S.E.C.?* The rules involved were Rules 17a-3, 17a-4 and 17a-5 (17 C.F.R. §§ 240.17a-3,

* The Court instructed the jury:

"The only crime charged is that these defendants are claimed to have kept false records and to have filed false reports, to conceal their imminent or actual insolvency.

What, then, is the particular section of the securities laws which defendants are charged with violating and with having conspired to violate?

It is a section of the 1934 Act which provides in pertinent part as follows:

'Every broker or dealer'--and obviously the firm of Orvis Bros. was a broker and dealer--'shall make, keep and preserve such accounts, correspondence, memoranda, papers, books and other records and make such reports as the Securities and Exchange Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors.'

The principal SEC regulation with which we must concern ourselves is the one requiring brokers, such as Orvis Bros., periodically to file a questionnaire—that is what it is called—setting forth certain specified financial information.

It is the claim of the Government that the defendants conspired to file such a questionnaire with certain materially false information and that in October of 1969 they actually did file or caused to be filed a materially false questionnaire.

The said questionnaire is claimed to be false in the following particulars:

- A, Statements of the trading and investment account of Orvis were falsely inflated.
- B, Statement of correction of customers fully paid securities loaned and pleaged in error was false.
- C. Statement of balances in customers cash accounts were falsely inflated.

Those are the particulars in which the Government claims the particular questionnaire was false.

The Government also claims that in the course of controlling to file such false questionnaire the defendance violation of other SEC regulations maintained or could be to be maintained false books of recount in their characterists.

Affidavit of Jerome J. Londin in Support of Motion
240.17a-4 and 240.17a-5). There was no tectimony as to the record keeping requirements of Rules 17a-3 and 17a-4. In the
Court's instructions to the jury, there were prejudicial errors of omission and commission.

40. Although/rules in issue are lengthy and complicated, they were neither read nor explained to the jury. In fair-

- 40. Although rules in issue are lengthy and complicated, they were neither read nor explained to the jury. In fairness to the Court, it should be noted that neither the prosecution nor the defense requested the Court to do so. Nevertheless, this failure to instruct the jury on the very rules in issue is plain error.
- 41. The legal confusion engendered by Count 1 was set forth in Anderson's brief in support of his motion to dismiss the conspiracy count. The motion's invocation of the statute of limitations is pertinent now. With only a general verdict of guilty on the conspiracy count, an acquittal on the substantive count, and no indication of the jury's reasoning (3102-3), how are we to know which of the transactions the jury found to have been falsely recorded to Anderson's knowledge? How are we to know which of the records enumerated in Rule 17a-3 the jury found to have been falsely made?
- 42. How are we to know whether the record upon which the jury based Anderson's conviction was not in fact Gov. Ex. 26--Kilduff's 30:1 net capital computation of about April 1969--which need only be kept for three years? Rule 17a-4(b)(5). Or a record reflecting securities borrowed and securities loaned (Rule 17a-3(a)(4)(C), which need only be kept for three years? Rule 17a-4(b)(1). Or any of the other records under the three-year limitations period of Rule 17a-4(b)(1), which are set forth in Rule 17a-3(a)(6) through (8), which would include all of the questioned transactions in Clinton Oil stock?

182a Affidavit of Jerome J. Londin in Support of Motion

- 43. Moreover, proof of the scienter requirement was lacking. In Odett v. Shearson Hammill & Co., Inc., F.Supp. CCH Sec.L.Fep. § 95,038, at p. 97, 636 (S.D.N.Y. 1975), Judge Carter held (n. 12):
 - "12. Although the language of Rule 15(c) 1-2 implies that negligence is sufficient, see 6 Loss at 3885, a Commission rule cannot dispense with a requirement of scienter, if such requirement is imposed by the language of the statute under which the rule is promulgated. The language of § 15(c)(1), which is similar to that of § 10(b), 6 Loss at 3884, implies that § 15(c) requires proof of scienter comparable to that which must be shown under Rule 10b-5."

A fortiori, this reasoning applies to the imposition of criminal sanctions for violation of an S.E.C. rule. See Section 32(a) of the Securities Exchange Act of 1934, Title 15 U.S.C. § 78ff(a), charged in Count 1, which makes criminal only a wilful violation.

- 44. Moreover, Anderson contends he was ignorant of a substantial part—if not most—of the rules in question. A hearing on this issue is requested. Under Section 32(a), 15 U.S.C. § 78ff(a), the penalty provision of the 1934 Act, whose violation is charged in the conspiracy count:
 - "... no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation."
- 45. The difficulty confronting the Court was caused by the shifting position taken by the prosecution. In opening its case the prosecution claimed:
 - "...before acting, Mr. Kilduff, the evidence will show, always went to Sloan, Anderson, Euker and Villani, and they all agreed and acknowledged and promoted what he should do." (Opening, 4/3/75, meh 22)
- 46. No such evidence having materialized, over repeated objection and exception, the prosecution contended that Anderson participated in a conspiracy of silence by inference, by knowing

Affidavit of Jerome J. Londin in Support of Motion and not "blowing the whistle", a "cover-up"--though no such charge appeared in the indictment and thus should have been precluded by Grunewald v. United States, 353 U.S. 391 (1957).

After various jury questions evidencing its obvious confusion and numerous defense exceptions to the Court's answers to the jury, a modified conspiracy of silence instruction was given, over objection, which permitted the jury to find participation in a conspiratorial agreement by Anderson from his knowledge and silent presence at a meeting. It is respectfully submitted that the instructions were erroneous, and, in any case, that there was no evidence to support a conviction on that theory.

47. Near the conclusion of Kilduff's direct examination, the Court said to the prosecutor:

"I assume also you are going to have some evidence against Mr. Anderson before we get through." (441).

* * *

"He certainly knows there is a conspiracy going on. He certainly didn't do anything to stop it. I can't see he did anything very active to push it along" (442).

When the prosecutor said Anderson "certainly promoted the conspiracy," the Court answered:

"I haven't heard anything about that" (442)

This caused the prosecutor to question whether the prosecution would continue if the case would not get to the jury on Kilduff alone (442-3). The Court answered:

"I think it probably would. I think you are making an argument that when he went to the general partners, general partners' meetings and sat by and let them tell falsehoods, they probably could infer from that that he agreed to do that, and that would be enough, I assume." (443)

When the prosecutor asked about "Villani on the same basis," the Court would not express an opinion (443), though

Affidavit of Jerome J. Londin in Support of Motion there was no conceivable legal difference between the two defendants.

After the prosecutor again expressed his primary on reliance Kilduff, the Court said:

"I would have to let it go to the jury on the theory when Mr. Anderson was a general partner, when he went to general partners' meetings and let the general partners be told things that he knew to be false, I suppose I would have to say that the jury is entitled to infer from that that he had agreed with his associates to do that." (444)

- 48. Its direct examination of Kilduff having failed to elicit any of the affirmative conduct by Anderson promised in its opening, the prosecution seized on these comments by the Court, and thus began the theory of a conspiracy of silence by inference.
- 49. In summation the prosecutor said that Kilduff, Euker and Sloan had devised the seven-way scheme (2958-9), but that Anderson and Villani must have known (2946-8) and promoted the conspiracy (2949, 2959-60) by not "blowing the whistle" (2970, 3002).
- agreement to "fool the S.E.C.." For that reason the prosecutor argued that he "promoted the venture" by silence, by "keep[ing his] mouth shut. . .Not once did Carl Anderson get up before the general partners and blow the whistle" (2969-70). He particularly relied on Anderson's silence when new partners—admitted in his absence and through the efforts of others—came into Orvis (2969-70), and Anderson "just sat back" (2969), "not saying one word" (2971). Anderson's silence in no way "promoted" the conspiracy to "fool the S.E.C.".
- 51. Having erroneously claimed that Anderson promoted the conspiracy by not rejecting new partners' capital, the

185a Affidavit of Jerome J. Londin in Support of Motion

prosecutor did an about face and argued that Anderson promoted the conspiracy by rejecting Gamelson's capital (2975). How did this promote a conspiracy to fool the S.E.C.? It did not. Nor did Anderson's conversation with Gamelson and Smith on which the prosecutor relied as "the best example of all" (2971), further a conspiracy to falsify records in order to fool the S.E.C. (2967, 2970).

- 52. The Court's instructions to the jury could not and did not dispel the erroneous belief as to the law of conspiracy which the prosecutor's summation indelibly etched on their minds. 'Faced with a troublesome conspiracy count which, as the jury put it, "goes all over the place" (3072), the jury repeatedly sought clarification on whether it could infer participation in a conspiracy from the defendant's silence. Defense counsel regularly excepted to the Court's answers.
- "a conspirator can further the conspiracy by silence, the Court supported the prosecutor by saying: "Well, in a certain limited extent that is true" (3033). There followed a lengthy illustration about a hypothetical bank teller which posed two examples, neither of which was appropriate, because each presupposed the very issue in question: Was he a member of the conspiracy?

 The first example began "one member of this conspiracy is a bank teller" (3033); the second example began by referring to a bank teller who "had no part in it" (3034). While the Court said that "before either defendant can be considered guilty of the conspiracy, he has to have been found a deliberate participant in it" (3035), the Court left the jury with the belief instilled by the prosecutor that silence equals participation.
- 54. The Court attempted to clarify its prior illustration by telling the jury:

186a Affidavit of Jerome J. Londin in Support of Motion

"There does have to be an agreement for there to be a conspiracy by definition. But you don't have to find that they sat around and said, 'We agree.'

What I mean is you can infer the agreement from what you see them do. The illustration I gave of the common undertaking, where three of you go to lunch and send one of you ahead to make a reservation and order lunch, but there had to be an agreement otherwise you wouldn't know what you were doing. But my failure to use the word 'agreement' doesn't mean that you don't have to find an agreement. It has to be a common undertaking and if you see a common undertaking going forward you can infer, if you wish, that everybody has agreed to do what you see them doing.

All right, then the illustration I gave you about silence. In the illustration of the non-participating, I told you about his brother, and I injected in the thing he may have pleaded with his brother to stop. Well, that was just a kind of flourish I put in. If he hadn't pleaded with his brother to stop he still would not be guilty. There is no necessity of pleading to stop the conspiracy. I just kind of threw that in. I might have confused you and you might have thought that this second illustration he would have been guilty even if he just failed to use moral suasion with his brother. He didn't have to do anything. He may know all about it and maybe secretly in his heart glad it is happening.

It has nothing to do with it. Unless he participates in it he is not quilty of a conspiracy. So that little flourish I put in was not intended to change the meaning." (3058-9)

- 55. However, this did not cure the error. While the Court said "there does have to be an agreement" and "unless he participates in it he is not guilty", the Court still told the jury it could "infer the agreement" but did not explain how the jury could infer the agreement from silence.
- 56. As a result, after the jury said that 'Count 1 goes all over the place" and asked for it to be simply put (3072), the Court answered:
 - ". . . All you have to say is defendant so and so guilty or not guilty of the crime of conspiracy" (3073).
- 57. Since this merely restated the question and did not answer it, immediately thereafter the jury asked:

"In other words, is he or as he not a member of this conspiracy?" (3073)

187a Affidavit of Jerome J. Londin in Support of Motion 58. After further jury questions dealing with knowledge (Ct. Ex. 9, 3074, 3076), the Court gave additional instructions, to which the defense excepted, saving: "He must do something affirmative, your Honor. He must take some action evidencing his agreement." * * * ". . . they must find that the objective of the conspiracy was to file this false report (3077). "This false report", the one charged in the sub-59. stantive count on which Anderson was acquitted, was the only matter in evidence having any connection with S.E.C. The Court refused this request (3077) and said only: "I have nothing to add except, of course, everything I have said is qualified by everything I have said before, there must be an agreement, everything. I am just answering your question and I wasn't taking away anything of what I said before as to the necessity of agreement, wilfulness, acts, everything. You asked me just about knowledge, and that's what I answered." (3078) 60. Based upon the jury's prior two questions, the defense requested an instruction that: "Two, you may not convict Mr. Anderson on the basis of the Fund of Letters transaction unless you find beyond a reasonable doubt that, (a), it was falsely recorded and kept at the insistence of Mr. Anderson or the instance of Mr. Anderson to be filed with the SEC and, (b), it was done by him as part of an illegal agreement with at least one of the other conspirators to make, keep and file false records. In other words, it is not enough to convict Mr. Anderson if you find only that there was a conspiracy between others with respect to transactions in which he did not participate and that Mr. Anderson knowingly caused false records to be made, kept and filed without agreeing with one of the other named conspirators that it be done. That is not enough. I think it might be helpful that it be a Court Exhibit, too." (3030-1, Ct. Ex. 10). The request was denied.

188a Affidavit of Jerome J. Londin in Support of Motion

of the requested instruction was quickly apparent when the jury asked:

"Does knowing about the conspiracy and knowing its purpose imply being a member of the conspiracy?" (3081, Ct. Ex. 11).

62. Accordingly, defense counsel renewed his prior request for instructions (3081). Although the Court answered the jury's question, saying: "Well, the answer to that question is no" (3082), the Court did not give the requested instruction, but, on the contrary, reverted to the bank teller's illustration and said:

"Of course activity in the peculiar circumstances that I defined them to you as in relation with that bank teller, the one who was a participant, can be purposeful silence under the peculiar situation as the one I stated." (3082)

- 63. When the Court asked whether that answered the question, the jury inquired whether knowledge of the conspiracy and "wilful silence . . . not necessarily a positive act" would suffice (3082-3).
- 64. Although the Court replied: "To be an act in furtherance of the conspiracy -- silence must be a planned act" (3083), the Court nowhere related this to Anderson or to an agreement between Anderson and another alleged conspirator (3083-4). Immediately after its previously quoted comment

Affidavit of Jerome J. Londin in Support of Motion requiring that silence be a planne act, the Court said:

"For example, in this kind of situation one of the other conspirators would have had to have known he was going to be in some situation where speech was going to be required of him. This would have to be a matter considered by the conspirators or one or more of them. He would have to have planned to be in such and such a place and keep silent in such and such a situation" (3083).

In other words, the jury was not told it had to be Anderson's planned act.

65. After taking exception, defense counsel observed of the jury's repeated questions:

"By virtue of the jury's repeated questions on this, it indicates their lack of awareness of what your Honor has sought to tell them" (3085).

- 66. The Court's subsequent attempt to clarify conspiracy by silence (3086) was not satisfactory to the defense, which asked for and was refused an instruction that "in the context of this case silence is not enough" (3089). This concluded the day's court session. It is submitted that the instruction should have been given, because there was no evidence of Anderson's agreement to join the conspiracy by remaining silent.
- 67. Immediately after the previously quoted discussion the Court adjourned for the day, to resume the following

Affidavit of Jerome J. Londin in Support of Motion day, April 30th, at 10 a.m. (3089). At 9:45 a.m. defense counsel submitted a proposed instruction to the jury on the issue raised at the conclusion of the prior day's proceedings (3095-6, Ct. Ex. 12). No instruction was given until 10:30 a.m., when the jury had been deliberating for 30 minutes (3090).

- defense counsel took exception, arguing for an instruction that the jury could not infer a conspiratorial agreement from silence (3093-5). Defense counsel asked for an instruction that "you may not infer joining a conspiracy by silence. There must be an expressed agreement." The Court disagreed, saying it may be inferred from the act (3095). Defense counsel asked the Court to charge the omitted portions of his request in Ct. Ex. 12, which the Court, incorrectly I submit, said had otherwise been covered (3096).
- 69. The conspiracy conviction was obtained on an erroneous theory of law which, in any case, was unsupported by sufficient evidence. There was no evidence, persuasive beyond a reasonable doubt, that Anderson by his silence joined a conspiracy to fool the S.E.C.
- 70. The lengthy pre-indictment delay deprived
 Anderson of his Fifth Amendment right to due process. According
 to the indictment, filed on Sept. 10, 1974, the conspiracy began
 on Sept. 1, 1968. The overt acts were concentrated in the

191a

Affidavit of Jerome J. Londin in Support of Motion
Spring and Summer of 1969 (outside the period of limitations),
with just a few incidents thereafter within the statutory period,
such as the Oct. 16, 1969 filing on which Anderson was acquitted.
Although the Oct. 16, 1969 overt act satisfied the statute of
limitations by one month, the indictment should be dismissed
because the inexcusable and prejudicial pre-indictment delay
denied Anderson due process.

- 71. There was simply no reason for the lengthy delay. By the Summer of 1970 Orvis, to the S.E.C.'s knowledge, was in liquidation and had sought aid from the N.Y.S.E. special fund. Anderson testified before the N.Y.S.E. on Oct. 23, 1970 and before the S.E.C. on Sept. 22, 1971 and Oct. 1, 1971. According to the voluminous and numerous transcripts of S.E.C. interrogations of witnesses and prospective defendants in this case, most interrogations were completed in 1971, and the remainder were completed by mid-1972. Even Vesco was interrogated on April 18, 1972 (Gov. Ex. 3541 id.).
- 72. Nevertheless, the case languished in the United States Attorney's office until its presentation to the grand jury began around mid-July 1974, with an indictment being filed on Sept. 10, 1974, at or about the very day the Assistant in charge resigned, when Counts 2 through 7 were already statute-barred and only the prolix conspiracy count could save its otherwise statute-barred components. It was primarily the

Affidavit of Jerome J. Londin in Support of Motion overt act involving the Oct. 16, 1969 filing that saved the indictment for posterity.

- 73. The prejudice to Anderson was demonstrated by the trial record. Ferhaps the most contested issue in the case involved the date of the meeting at which Kilduff claimed to have shown Gov. Ex. 26 (the 30:1 computation) to the Executive Committee. The date was crucial. Because of the price of Clinton Oil stock, it had to be on or after April 23, 1969; and also, because of Eucker's absence from Orvis, the meeting could not have occurred until his return in May, when Anderson was away from Orvis. This crucial issue may have been decided on the basis of Kilduff's faulty memory of an alleged event that occurred six years before his trial testimony. The prosecutor in summation took advantage of the six-year hiatus by arguing in summation that, in cross-examining Kilduff, Zalduondo and presumably other witnesses (such as Mezzetta and Vayda) as to their memory of events five and six years before, defense counsel was nit-picking (2981, 2983-4, 2995). The defense was precluded from effective cross-examination of prosecution witnesses by their continued reliance on the lapse of time to explain their faulty memories of the details of crucial events. This was a denial of due process.
 - 74. Anderson was denied his Fifth Amendment rights to indictment by a grand jury and to due process of law when the prosecution failed to call Peter Schmidt as a witness before

193a

Affidavit of Jerome J. Londin in Support of Motion the grand jury. I have been told by Mr. Anderson that for years there were rumors that Kilduff had made statements to Peter Schmidt, his attorney, that exculpated the defendants, but no information could be obtained from Schmidt because of his invocation of the attorney-client privilege. It is apparent from Kilduff's interrogation before the grand jury on July 18, 1974 (Gov. Ex. 3501 id., p. 40) that the Assistant United States Attorney who presented the case to the grand jury had also heard of this.*

^{*}Assistant United States Attorney Higgins questioned Kilduff as follows:

[&]quot;Q. Did you have any discussion with Peter Schmidt either back at his office, en route to his office or at a lunch that you had with him and Tom Shaw thereafter with respect to any of the facts of what took place at Crvis Brothers?

[&]quot;A. That was the first time that either Peter Schmidt or his associate, Tom Shaw, became aware that there were any falsification of figures, as best as I know.

[&]quot;As Peter Schmidt and I left the New York Stock Exchange, there was an obvious lack of conversation between us. We walked the six or eight blocks, whatever it was, back to their offices, and we came to the reception room of Breed, Abbott, there was an anteroom or waiting room adjacent to it.

[&]quot;Peter asked me to wait in there while he spoke to Tom Shaw.

[&]quot;About ten or fifteen minutes later both he and Tom Shaw returned to me. I recall waiting in that room because it was I guess the very first time that I was alone just after the realization of the impact of the entire situation, and I was quite emotionally upset.

[&]quot;As Peter Schmidt and Tony Shaw walked in again, Tom Shaw, as I remember, kind of put his arm on my shoulder, tried to calm me down somewhat and said something to the effect that it is not the end of the world, along those lines.

194a Affidavit of Jerome J. Londin in Support of Motion

"And the three of us then went upstairs in the same building, to a lunch club and had lunch.

"I recall again that we were sitting in the middle of the room and again I became rather emotional, and again realizing the full impact that I was going to have to go home and relate this to my family, et cetera.

"My thoughts at that time, I am sure, were rather selfish insofar as I was very much concerned about my own welfare, welfare of my family, things of that nature.

"Also Tom and Peter had told me that it would be no longer possible for their firm to represent me since they were also representing the liquidator of Orvis Brothers and they felt that they would have a conflict of interest.

"So in addition, I had a very lonely type of feeling.

"I probably, although I don't really recall this part of the conversation, said and admitted to them, yes, we had jockeyed the figures or something of that nature.

"I don't think that my discussion with them at the time would have gone into any details as to, for instance, today we mentioned the dangling debits and several others, as I recall it. It would be a quite general type of thing.

"At the end of the luncheon I left and went on home.

"Q. Did you tell Peter Schmidt on that day, either during the course of your walk back to his office, or during the course of the luncheon, that you, in fact, had been responsible for the falsifications of the firm's books and records but that none of the other members of the Executive Committee were aware of what you had done and that you had done that out of a desire to save the firm?

"A. No. I knew, for instance, who else knew and was involved and whatnot in the months that we had gone through various transactions.

"I was fully aware that other members of the Executive Committee were fully aware of the various things that were spoke about today, so there would be no logic in my saying that to Peter Schmidt.

"I recall the walk back from the New York Stock Exchange to their office as being very silent. I suppose at the moment I was -- or during the walk back I was looking for a friend, you might say, and Peter was very silent. He told me later on he was purposely silent because he was thinking about the possible conflict of interest that his firm might have and

195a Affidavit of Jerome J. Londin in Support of Motion

that the rumors were well-founded. Because the indictment was based on Kilduff's testimony, without which, on the record of this case, there could have been no indictment, the prosecutor had a duty to call Mr. Schmidt before the grand jury. The prosecutor could have secured Mr. Schmidt's testimony by having Kilduff, his own cooperating witness, expressly waive the attorney-client privilege. I was told by Mr. Schmidt that, when the prosecutor called him during the grand jury investigation, he told the prosecutor that he would testify upon receipt of an explicit waiver of the attorney-client privilege.

According to Mr. Schmidt, he never received that waiver, but only an equivocal letter* from Kilduff's attorney in which there was no explicit waiver by Kilduff of the attorney-client privilege, which Mr. Schmidt told Mr. Higgins was not a

he didn't want to say anything at all until such time as he had an opportunity to discuss it with his associate. So that was a silent walk.

[&]quot;I was in the antercom that I mentioned alone for ten or fifteen minutes, while he, I presume, he discussed it with Tom Shaw. And then after that it was the three of us, Tom Shaw, Peter Schmidt and myself who went to lunch.

[&]quot;But, no, I didn't tell Tom Shaw and/or Peter Schmidt that I was solely responsible for it. I might well have -- I might well have spoken of the fact that we did this, or that why did I do that, or things of that nature. But in no way did I try to eliminate other members of the Executive Committee from the knowledge that they had."

^{*}Mr. Schmidt had been the attorney for Orvis Bros. Before the New York Stock Exchange he represented only Kilduff. Anderson was represented before the New York Stock Exchange by Mr. James V. Hallisey. Sloan was represented before the New York Stock Exchange by the firm of Olwine, Connelly, Chase, O'Donnell & Weyher. Eucker was not represented by counsel before the New York Stock Exchange.

^{**}Copy annexed.

196a

Affidavit of Jerome J. Londin in Support of Motion sufficient waiver. Although Mr. Higgins told Mr. Schmidt he would get another letter, none was ever forthcoming; and Mr. Schmidt was never called as a witness before the grand jury.

informed that Kilduff, by his testimony on direct examination, had waived the privilege. Mr. Schmidt testified on April 24th. At the Court's request he was recalled on April 25th. Although Mr. Levine, whose threats to Kilduff caused Kilduff to change his testimony and implicate Anderson, is still employed by the New York Stock Exchange and makes his office at 30 Broad St. et, he was not called as a witness to rebut Mr. Schmidt, even though the defense did not rest until April 28th. Where was Mr. Levine between April 24th and April 28th?

77. We know from the N.Y.S.E. transcript of Sloan's testimony on May 13, 1971 that his attorney, James E. Tolan of the Olwine, Connelly firm, said to Mr. Levine's face that Mr. Levine had said to him "he was out to nail my client, Mr. Sloan." Mr. Levine claimed he was misunderstood and had only said he was looking to nail the facts and not Sloan. Mr. Tolan disagreed as to Mr. Levine's veracity.* I have been told that Mr. Levine also made threats against Anderson, a matter which will be covered in my answer to Mr. Feinberg's response to the Court's inquiry of May 7, 1975.

^{*}See the attached first six pages of the transcript.

197a Affiidavit of Jerome J. Londin in Support of Motion CONCLUSION

Anderson's Fifth Amendment rights to due process, both by the failure to call Mr. Schmidt as a witness before the grand jury and by the lengthy and prejudicial delay in presenting the case to the grand jury. The conviction was contrary to the law and contrary to the weight of the evidence. Accordingly, judgment of acquittal should be entered. Alternatively, if such relief not be granted, the Court should set aside the jury verdict and grant the defendant a new trial in the interests of justice. At a new trial the extraneous material, the improperly admitted evidence, and the prejudicial comments and other errors can all be excluded and avoided, and Anderson can then receive a fair trial.

JEROME J. LONDIN

Sworn to before me, this 9th day of June, 1975

RECIPIED U. DUFF

Molary Public. Clafe of New York

Challed in New York County

Commission Extendit Institute 10, 1976

198a LETTER ANNEXED TO LONDIN AFFIDAVIT BUTOWSKY, SCHWENKE & DEVINE ALTORNEYS AT LAW DAVID H BUTOWSKY 230 PARK AVENUE THOMAS & SCHWENKE NEW YORK, N. Y. 10017 MICHAEL C DEVINE 212/725-5360 HARBARE M. LOMONSON August 13, 1974 Peter G. Schmidt, Esq. Breed, Abbott & Morgan 1 Chase Manhattan Plaza New York, New York Dear Mr. Schmidt: This firm is counsel to Mr. Thomas Kilduff. As you know, a Federal Grand Jury is currently inquiring into certain matters involving Orvis Brothers. We understand that in connection with an investigation by the New York Stock Exchange, your firm represented both Orvis Brothers and Mr. Kilduff. We also understand that during the investigation Mr. Kilduff had a conversation with you in your office and a subsequent conversation with you and Mr. Thomas Shaw of your firm in the Wall Street Club at 1 Chase Manhattan Plaza. We understand that Mr. Kilduff has testified before the Grand Jury concerning such conversations. Very truly yours, BUTOWSKY, SCHWENKE & DEVINE Savigm. Postoradu David M. Butowsky DMB: ng BY HAND

199a N.Y.S.E. TRANSCRIPT OF SLOAN'S TESTIMONY ANNEXED TO LONDIN AFFIDAVIT

NEW YORK STOCK EXCHANGE, INC.

DEPARTMENT OF MEMBER FIRMS

*

New York, May 13, 1971 (10:40 A.M.)

MR. FERGUS M. SLOAM, JR., employee, Comporate Finance Department, Laidlaw & Co. Incomposated, appeared before Messrs. Myron Levine and Richard P. Flamm (where indicated), Special Counsel, Department of Member Firms, when the following discussion took place:

Also Present: James E. Tolan, Esq. of Olwine, Connelly, Chase, O'Donnell & Weyher, Councel for Mr. Sloan.

(%. Flamm was present at this time.)

MR. LEVINE: Mr. Sloan, this is a resumption of our discussion that last was held on May 6th, and in that regard, I have received copies of the transcript of that discussion, and at this time I would like to deliver two copies of the transcript to either yourself or your attorney, Mr. Tolan, for your review. I will follow that up with a letter requesting that you make any

additions or corrections on a separate paper and return that to me, and also that you sign one of the copies of the transcript and vocum that document to me.

DR. TOLAN: I achar medge proceipt of the two

believe that Mr. Levino will provide me also with the exhibits either marked during Mr. Slean's testimony here, as well as those documents which were shown to him and referred to in the transcript, and I would appreciate receiving those on ampediatously as possible.

MR. LEVIES: Yes, Mr. Tolen, I will do so.

MR. TOLAN: I now want to make a statement

for the record.

In view of cortain events that have transpired since the provious events, specifically, as a
result of a telephone than the life I had with Mr. Levine
on April 7, 1971, as a result of that beliephone conversation and certain statements made during that
telephone conversation, downer which Mr. Levine
stated that he was out to radi by elicit, Mr. Sloan,

201a N.Y.S.E. Transcript of Sloan Testimony

I feel, and I have informed Mr. Sloan, that we are appearing have under protest.

As evidenced from my conversation with Mr.

Levine that day, this no longer is the kind of an informal fact finding investigation usually conducted by the New York Stock Exchange, but is turning into some kind of a prosecutural session, or sessions, and takes on the elements of a witch-hunt aimed at Mr.

Sloan.

with Mr. Levine on April 7th, that I had a conversation also with Mr. Stuart Melson, and he expressed to me that despite my fears, that this was the usual fair investigation being conducted by the Exchange, and that the Exchange would get into not only what happened in 1969, but also the efforts by Mr. Slean on behalf of Oxvis Brothers in 1970 when he first found out there was a violation of the net capital requirements; the fact that Mr. Slean personally put in over \$500,000 to cave Orvis; the fact that Mr. Slean notified and had communications with members of the Enchange,

including Mr. Bishop; and, indeed, during that period of time eliminated the violation, even though it subsequently grow and resulted in the liquidation of Orvis Breehars.

vestigation, which it is supposed to be, has taken,
I have informed Mr. Sloam, and he has acknowledged my
advice, and, therefore, even though we are here and
will continue to cooperate with the Exchange, we are
here under protest.

remark thes I stated to you over the phone during that conversation that I wished to rail your client, I also wish to state for the record that that statement is not factual. I indicated to you over the phone that I wanted to mail the facts down, and I explained that to you even the phone; you called me what I meant, and I explained that provide that. I made every effort to explain that provide remark to you, that I was looking to mail the facts down, and not looking to mail your client.

You refused to give we the opportunity to talk; you

203a N.Y.S.E. Transcript of Sloan Testimony

wanted to temperate the conversation. And I was forced to discuss the matter with Mr. Melson so that he could speak with you in that regard, and to further satisfy you with the fact that what I was looking to do was to nail the facts down due to the inconsistent statements, or at least due to the fact that I had statements from others which appear to conflict with the statements of Mr. Slean, and that I was looking to nail the facts down.

into a long argument with you, but just let me say, you did not say noil the facts down, you said you were out to mail im. Slean, my client. Now, let's get the record straight. And, as a result of that, im. Stuart Relean called me and said it was a very inappropriate choice of words, that you really didn't mean it.

Mr. LEVIED: 18. Tolan --

Mi, Wolldh: For let's drop it there, and just

you while you steemed for the record what your belief as to the conversation was.

continue on.

1,

MR. LIVERM: Well, then, don't interrupt me when I wish to state for the record what my belief is as to what the foots ware.

It is also a fact that I did state to you, subsequent to my use of the word poil, that it was with reference to the facts, did I not?

you were going to neil my client, and I pressed you when I got incensed at the attitude of the New York

Stock Exchange as evidenced by you, you then tried to give me an explanation of thest you meant by that.

MR. LEVINE: Mr. Tolen --

MR. TOMAN: There is correct, Mr. Levine.

other than to state for the record that what I told you had reference to the ferme, and did not have reference to Mr. Shoan, and that was further emplained to you by Mr. Delson who I went to, and who called you to further explain the situation.

In any event, Mr. Slean .--

205a

SUPPLEMENTAL AFFIDAVIT OF JEROME J. LONDIN IN SUPPORT OF MOTIONS UNDER RULES 29(c) AND 33 AND WITH RESPECT TO SENTENCING

UNITED	Si	M.T	ES	DIST	RIC	T	CO	URT
SOUTHER	N	DI	STR	ICT	OF	NE	U	YORK

UNITED STATES OF AMERICA, : 74 Cr. 859 (WK)

SUPPLEMENTAL AFFIDAVIT

CARL W. ANDERSON, et al., : IN SUPPORT OF MOTION

- v -

UNDER RULES 29(c) AND 33

Defendants. : AND WITH RESPECT TO

SENTENCING

STATE OF NEW YORK COUNTY OF NEW YORK : ss.: SOUTHERN DISTRICT OF NEW YORK)

JEROME J. LONDIN, being duly sworn, deposes and says:

1. I represent the defendant Carl W. Anderson in the above-captioned case. This affidavit is made in response to the answer of the Assistant United States Attorney dated June 5, 1975 to the Court's letter dated May 7, 1975 requesting that "the Government make recommendations of sentence with respect to the defendants Sloan, Eucker and Anderson." A copy of the Court's letter dated May 7, 1975 to the United States Attorney is attached as Exhibit A; and a copy of the Assistant United States Attorney's answer dated June 5, 1975 is attached as Exhibit B. Because the appropriate response on behalf of the defendant Anderson deals not only with the matter of sentence but also is germane to his motion under Rules 29(c) and 33, this response is being submitted in affidavit form and as a supplemental affidavit in further support of his motion for judgment of acquittal and, alternatively, for a new trial.

- 2. The Court's first request asks the Government "to estimate the extent of financial loss occasioned by defendants' illegal activities", and asks "how much, if any, cash would have been saved had defendants promptly and accurately reported the firm's deteriorating financial condition to the S.E.C. and to the Exchange."
- 3. The threshold questions posed by the Court's request are: (1) What illegal activity, if any, of Mr. Anderson occasioned a loss; and (2) at what point in time did Mr. Anderson learn of the firm's deteriorating financial condition?
- Attorney's response of June 5, 1975 that the 3 1/2 million dollar loss incurred by the New York Stock Exchange Special Trust Fund, funded by broker members of the Exchange, was occasioned solely by the hypothecation of customers' securities. It was made crystal clear by the prosecution's case at trial that Mr. Anderson had nothing to do with the hypothecation, nor did he evenknowabout it until the New York Stock Exchange's examination in December of 1969. Indeed, the United States Attorney's letter of June 5, 1975 notes: "There is a serious question as to whether Sloan or Anderson were ever made aware of the extent of Eucker's hypothecation. Clearly, Kilduff was in the dark about it." The case for Mr. Anderson is in fact much stronger, because there is no question at all. Mr.

Anderson simply did not know about it, and no one has said that he did. The testimony of Kilduff and Lanz clearly negated any impropriety by Mr. Anderson. Moreover, it should be noted that Mr. Eucker's plea of guilty was not to the conspiracy count, but only to the substantive count charging him with hypothecation.

5. Furthermore, considering the loss incurred by the New York Stock Exchange Special Trust Fund, it is important to remind the Court that the New York Stock Exchange examiners in December 1969 were made aware of a hypothecation problem, as Mezzetta noted in his report of December 19, 1969 to all of the Orvis partners. According to Mezzetta, the New York Stock Exchange examination of Orvis' records, which were properly kept, disclosed:

"More problems existed in regard to segregation since we are only permitted to use 140% of the adjusted balance of an account and in numerous instances the firm was using anywhere from 300% to 480% of adjusted debit balances." (Def. Ex. AT, p. 2, No. 4)

- 6. Moreover, this same New York Stock Exchange examination in December 1969 disclosed that as of December 1, 1969 Orvis' capital ratio was 22.52 to 1, and "if OB had to absorb all of the short positions, our A.I. would be 28.04 to 1" (Def. Ex. AT).
- 7. Even more important on this subject as to the loss incurred by the New York Stock Exchange Special Trust Fund and what would have happened had the financial condition of

Orvis been previously disclosed to the Exchange is the fact that the Orvis answers to the New York Stock Exchange Special Questionnaire of December 31, 1969 reported a capital ratio of 3619% (Def. Ex. J), and the Exchange did not close Orvis' doors. It permitted Orvis to continue to operate until June 1970. Since it is the position of the Exchange that the continued operation of Orvis occasioned a greater loss by the Exchange's Trust Fund, it is particularly germane to observe that the proof at trial disclosed that by far the largest part of the hypothecation losses occurred in the Spring of 1970 -- long after the Exchange knew that Orvis' ratio was 3619%, and long after the Exchange knew that Orvis was using anywhere from 300% to 480% of adjusted debit balances as opposed to the 140% permitted under the hypothecation rule.

that Eucker made a valiant effort to reduce the amount of customers' securities hypothecated and loaned, which totalled approximately \$7,000,000 as reflected by the Haskins & Sells audit as of August 31, 1969. According to Lanz, after the Haskins & Sells report had been received in October of 1969, at the request of Eucker he attempted to substitute for the fully paid for securities that had been used according to the Haskins & Sells report, and by January of 1970 the \$7,000,000 figure had been reduced to about 2 1/2 million dollars (1131). It is obvious then that had the Exchange closed Orvis in December 1969 when it knew that Orvis' ratio was 3619%, there would have

been no loss at all to the Trust Fund. Why do I say this? I say this because according to the testimony of Vayda of Maskins & Sells, which testimony as to subsequent hypothecations and loans of customers' fully paid for securities in the Spring of 1970 was received in evidence by the Court over strenuous defense objection, the subsequent hypothecations and loans of customers' fully paid for securities as of May 3, 1970 totalled \$8,073,000 -- \$6,532,000 hypothecated and \$1,541,000 loaned (1351; Gov. Ex. 142), and, according to the U. S. Attorney's letter of June 5, 1975, the amount was \$11,000,000 by July 1970.

9. Thus, at the time when the Exchange knew that
Orvis' ratio was 3619%, the amount of customers' fully paid for
securities hypothecated and loaned was \$2,500,000. This subsequently increased by May 3, 1970 to \$8,073,000 -- an increase
of \$5,573,000. Since the loss to the Exchange which was
occasioned solely by reason of the hypothecation and loan of
customers' fully paid for securities amounted to 3 1/2 million
dollars, clearly the Exchange's Special Trust Fund would have
suffered no loss at all had it closed Orvis at a time in December
1970 when the securities hypothecated and loaned amounted to
2 1/2 million dollars. The reason is that, by the continued
operation of Orvis, the additional loss occasioned by the hypothecation and loan of customers' fully paid for securities amounted
to \$5,073,000 by May 3, 1970 (\$8,073,000 less \$2,500,000), and
\$8,500,000 by July 1970 (\$11,000,000 less \$2,500,000).*

^{*}It is, of course, the defense's contention that the hypothecations were proper, because they did not exceed the aggregate

10. Did the New York Stock Exchange in December 1969 notify the S.E.C. that Orvis' ratio was 3619%? If so, the S.E.C. permitted Orvis to continue its operations. If the Exchange did not notify the S.E.C., then the Exchange waived its Rule 325 and, in effect, became jointly responsible with Orvis for any loss. This is in fact the subject of currently pending civil litigation in this Court. In this connection it should also be borne in mind that in 1969 -- as opposed to the situation pertaining at the time of this trial -- it was the New York Stock Exchange and not the S.E.C. that bore the responsibility of supervising its member firms. Accordingly, the partners of New York Stock Exchange member firms looked not to the S.E.C., but to the New York Stock Exchange for regulation. While it is different now, that was the atmosphere that prevailed at the time of the events here in issue. As far as partners of New York Stock Exchange member firms were concerned the Exchange could then waive its rules or change them. Clearly the Exchange waived its Rule 325 and permitted Orvis to continue in business.

11. The climate at the time of the events in issue are set forth in the remarks on March 8, 1971 of Senator Harrison A. Williams, Jr., who presided over the investigation of the securities industry by a Senate Subcommittee. He said:

"During the past two years the concept of self-regulation has faced its sternest test. Neither the S.E.C. nor the industry

indebtedness of all Orvis' customers, and the defense was barred from offering evidence on this issue.

has covered itself with honors, particularly in the area of financial regulation. Substantial problem areas have been discovered and whether the blame is with the self-regulators or the Commission is immaterial. There has, however, been a material reluctance by the Exchange to force firms to adhere to the law in the areas of net capital requirements, undersegregation, and back-office procedures. CCH Fed. Sec. L. Rep. (1970-71 Transfer Binder) ¶ 77,969, p. 80,150 (emphasis supplied).

12. As Senator Williams observed:

"During 1969 and 1970 the securities industry faced its sternest test since the depression. The Dow-Jones Averages dropped almost 200 points. At the same time Exchange volume decreased from 13.5 million shares daily to under 10 million shares. Approximately 110 firms disappeared because of financial difficulties. While the majority of these firms were merged into other firms, 12 major brokerage houses failed. Only large infusions of capital saved F. I. DuPont and Hayden-Stone from financial ruin. Goodbody & Company our nation's fifth largest stockbroker was absorbed by Merrill Lynch contingent upon an indemnification of \$30 million from New York Stock Exchange members." CCH Fed. Sec. L. Rep. (1970-71 Transfer Binder) ¶ 77,969, p. 80,148.

13. As a result of these problems, the New York
Stock Exchange Special Trust Fund expended \$50 million and
required further infusions of capital from the member firms
of the New York Stock Exchange. Eventually, SIPC had to be
created by the Government to continue this program. Orvis was
not alone in requiring funds from the Exchange Special Trust
Fund. Where Orvis does stand alone, I believe, is in the

criminal prosecution of its partners as a result of what was an industry-wide problem.

14. This must be borne in mind in assessing the comments of Mr. Ragusin, the Orvis liquidator; and it should also be borne in mind that Mr. Ragusin is now engaged in civil litigation with the defendants on this very issue, and, as such, he is hardly a disinterested party. The litigation has been pending in this Court since 1971 and has not yet been resolved, except for the fact that Haskins & Sells has settled the suit against it by the payment of \$400,000. One of the major issues in this pending civil litigation involves the wilfull and persuasive waiver by the New York Stock Exchange of its Rule 325 -- the net capital rule -- in its effort to save itself and the entire securities industry from collapse. The violation of Exchange Rule 325 permeated the entire securities industry. Had the Exchange not as a matter of policy waived that Rule, and had the Exchange enforced that Rule against its member firms, the Exchange itself might have collapsed, leading to a national economic disaster. The failure of the Government to institute this prosecution in 1971 -- when it had all the facts, as is more fully set forth in my affidavit of June 9, 1975 -- and in the appropriate context of the events in issue, must not only be taken into account in sentencing Mr. Anderson, but must also be taken into account in determining whether he was deprived of his Fifth Amendment right to due process by

the lengthy pre-indictment delay which prevented the jury from seeing this case in its proper context.

dealt with an alleged conspiracy to fool the S.E.C. However, what may probably be an issue in 1975 would not have been an issue in 1969, because the S.E.C. did not have the right to enforce the New York Stock Exchange Rules against its members. As the S.E.C.'s then chairman, William J. Casey, observed in his letter of December 28, 1971 to the President of the Senate and the Speaker of the House of Representatives in connection with the investigation conducted by Senator Williams' Subcommittee:

"The Commission's present authority over the rulemaking of the self-regulatory bodies is an illogical patchwork of provisions which falls short of giving the Commission authority to act promptly and effectively where a rule, or a proposed rule, is or might be injurious to the public interest. Specifically, the Commission has no power to prevent the adoption of a particular rule by an exchange, nor to abrogate it once it has been adopted."

* * *

"A limitation of the Commission's oversight power over the self-regulatory bodies is that it cannot directly enforce their rules against their members. . . . This was recognized by the Commission as far back as 1941, when it recommended that it be given specific enforcement authority as an effective remedy against 'dilatory and lax enforcement' by self-regulatory bodies of their own rules." CCH Fed. Sec. L. Rep. (Special Studies Transfer Binder) 774,801, p. 65,509 (emphasis supplied).

it until 1971 -- long after the events which are the subject of this case. Thus, even if the Exchange had notified the S.E.C., or even if the Haskins & Sells 1969 report to the S.E.C. had contained the proper information, all that the S.E.C. could have done was to refer the matter back to the New York Stock Exchange for disciplinary proceedings. Had that been done, the Exchange would have done nothing, as is obvious from the fact that in December 1969, it in fact did nothing although it was aware of the pervasive hypothecation of customers' fully paid for securities at Orvis and of the fact that Orvis' capital ratio was 3619%.

the fact that the hypothecations and loans of customers' fully paid for securities increased from \$2,500,000 in January 1970 to \$8,073,000 as testified by Vayda, or in excess of \$10,000,000 as testified to by Netelkos, or \$11,000,000 as claimed in the U.S. Attorney's letter dated June 5, 1975. The matter to be considered is the vitally important one that this occurred when Netelkos was in full control of Orvis -- the same Netelkos who is currently under a federal indictment for the illegal hypothecation of customers' securities at a different brokerage house shortly before his arrival at Orvis. As pointed out in my affidavit of June 9, 1975, it was prejudicial error to permit Mr. Anderson's conviction on such evidence. The error would be

compounded by taking it into account in imposing sentence upon him.

- 18. Two final points require repeating on the issue of hypothecation, not only with respect to the sentence to be imposed, but also with respect to the pending motion under Rules 29(c) and 33. First, the Court should recall the defense's contention that under Rule 8c-1(a)(3) no violation was established, because the value of the securities hypothecated did not exceed the aggregate indebtedness of all customers. Second, if at this late date the Government concedes "there is a serious question as to whether Sloan or Anderson were ever made aware of the extent of Eucker's hypothecation", how can Anderson's conviction be permitted to stand? The jury was permitted to convict Anderson for conspiring to fool the S.E.C. by means of Form X-17A-5, filed with the S.E.C. on October 16, 1969, in that the form falsely stated that the hypothecated securities had been "since corrected." If there is "a serious question" as to Anderson's knowledge of the extent of the hypothecation, how can his conviction be permitted to stand?
- 19. The next matter to be considered is the loss suffered by the general and limited partners and subordinated lenders of Orvis and by its employees and creditors. Everything said before dealing with the losses flowing from the hypothecation and loan of customers' securities is applicable to this

an additional loss to Orvis of \$5,573,000 because of the increased hypothecations and loans of customers' securities at a time when Anderson had no influence whatsoever at Orvis (supra), had the Exchange closed Orvis when it admittedly became aware of the hypothecation and capital ratio problems in December of 1969, the creditors would not have lost the estimated \$400,000 referred to in the U.S. Attorney's letter dated June 5, 1975, nor would the employees have lost \$50,000 of severance pay referred to therein.

20. Moreover, the U.S. Attorney's letter of June 5,

1975 states that the improper hypothecation approximated

\$11,000,000 by July 1970. This was 8 1/2 million dollars more
than the \$2,500,000 amount testified to by Lanz as of January

1970. Since this required the New York Stock Exchange Special
Trust Fund to disburse \$3,500,000 in order to pay off the balance
not covered by Orvis' assets, the Exchange's Special Trust
Fund needed only \$1,000,000 more than the amount testified to
by Lanz. Because the additional loss owing to the hypothecations
and loans of customers' fully paid for securities between

January 1970 and July 1970 amounted to \$8,500,000, had the New
York Stock Exchange timely closed the doors of Orvis, no loss
at all would have been suffered by the Exchange's Special Trust
Fund or by the general and limited partners and subordinated
lenders of Orvis who, in December 1969 were aware of Orvis'

condition. Moreover, the U.S. Attorney's letter of June 5,
1975 does not hold Anderson responsible for any partners' losses
following April 1969, saying that "if the firm had been liquidated
in the spring of 1969 it is highly likely that the partners would
still have been wiped out."

- 21. What then of the limited partners? As a result of the continued operation of Orvis, not only did Mr. Anderson lose his entire investment, but his wife (a subordinated lender) and aunt (a limited partner) also did. It should be borne in mind that Mr. Anderson could have obtained the withdrawal of his wife's capital and his aunt's capital, but did not do so. They too were wiped out. Had the firm terminated its affairs at an earlier date, the capital of Mr. Anderson's wife and aunt would have been preserved. What flows from this is the clear indication that: (1) Mr. Anderson was not aware of Orvis' impending demise; and (2) he was not made aware by other coconspirators of Orvis' perilous condition. Had they done so, Mr. Anderson would not have permitted the reinvestment in Orvis by his wife and by his aunt.
- 22. The U.S. Attorney's letter of June 5, 1975 directs the Court's attention to the testimony of various witnesses at trial that partners were invited to invest capital in Orvis.

 The letter refers to Tournet and Mezzetta. I recall that others were also mentioned -- Haggerty, Vrattos, Kostos and Arpante.

 What the U.S. Attorney's letter does not point out, and what

the Court will certainly recall from the testimony and exhibits at trial, is that these partners (except for Mezzetta) were invited into the firm only during Mr. Anderson's absence. Indeed, as to Mr. Tournet it was Zalduondo who made the special plea to Tournet and offered him the 1/2% interest, which did not previously exist at Orvis.

defendants, the U.S. Attorney's letter of June 5, 1975 should not be permitted to replace the evidence in this case. After listening to the overwhelming proof at trial, the prosecutor himself said that Kilduff, Eucker and Sloan had devised the 7-way scheme (2958-9), but that Anderson and Villani must have known (2946-8) and "promoted" the conspiracy (2949, 2959-60) by not "blowing the whistle" (2970, 3002). The proof at trial did not show that Anderson ran the firm. It showed that by the Spring of 1969 he had been stripped of his principal function. While he and his family remained substantial investors in the firm, he did not run Orvis. Indeed, in his grand jury testimony of July 17, 1974 (Gov. Ex. 3501 id.) Kilduff testified as follows:

"Q. In January of 1969, approximately, there was a change in the structure of control of the firm, namely, Ferg Sloan obtained the approval of the general partnership that he would be the managing partner of Orvis Brothers and Tony Zalduondo was made the senior partner of the firm, is that right?

"Q. Would it be fair to say that in substance or effect Ferg Slean thereafter had complete control over the day-to-day operations of the firm?

[&]quot;A. That is correct.

[&]quot;A. Yes. That's a fair statement.

Supplemental Affidavit of Jerome J. Londin in Support of Sentencing Motion "Q. He was the boss? "A. He was the boss, exactly." 24. It is for this reason that the prosecutor's summation repeatedly sought to implicate Mr. Anderson by his silence, claiming that Mr. Anderson had to know what was going on because he was "the lord high overseer" and "the honcho" Contrary to the U.S. Attorney's letter of June 5, 1975, there was no testimony that Anderson told Kilduff to falsify and cover up the condition of Orvis from the Exchange and the S.E.C. There was no testimony that he told Kilduff to falsify or to cover up anything; there was no testimony that he told Kilduff to say or conceal anything from the Exchange; and there was not a shred of evidence in the record that Anderson said or did one thing with respect to the S.E.C. 25. When the jury returned its verdict of guilty as to Mr. Anderson on the conspiracy count and acquitted him on the substantive count, although under the Court's Pinkerton charge it could have convicted Mr. Anderson had it accepted the prosecutor's contentions, the jury asked whether the Court wanted "any recommendation as to degree of guilty" (3102). The Court did not want it. 26. Based upon the jury's difficulty with the case and its numerous questions as to guilt by wilfull silence, it is my opinion that, had the jury been permitted to answer, it would have articulated its belief in Mr. Anderson's minimal participation.

- 27. The U.S. Attorney's letter of June 5, 1975 next It contends deals with the question of alleged perjury /that Anderson lied before the S.E.C. in 1971 and at the present trial. To support this contention, the Government points only to a few small areas from his lengthy testimony before the S.E.C. on September 22, 1971 and October 1, 1971 which totalled 171 pages, and as to which he was in no way impeached by cross-examination at the trial, and a few small areas from his testimony at the trial.
- 28. Before the S.E.C. Anderson testified that he had been eased out of power and had no control over Orvis' policy. The U.S. Attorney claims that this testimony was false. On the contrary, the overwhelming proof at trial showed this testimony to be true. The evidence showed that Anderson was stripped of his power to bring new underwritings to Orvis by the Spring of 1969. In Mr. Anderson's absence the Executive Committee gave three other partners a veto power over his decisions; whereas, on the contrary, the evidence showed that numerous underwritings occurred without his consent and, indeed, were committed without even his knowledge. Furthermore, the record showed that through the efforts of Zalduondo Mr. Anderson's position as Chairman of the Executive Committee was downgraded in the Spring of 1969 from one in which he was chief policy officer of the firm to one which made him responsible for solely implementing the policies designated by the Executive

221a

Supplemental Affidavit of Jerome J. Londin in Support of Sentencing Motion

Committee, of which he turned out to be a minority member.

- Anderson lied when he told the S.E.C. he was unaware of improper transactions having been placed on Orvis' books in order to improve the firm's capital position, and with denying at the trial that Kilduff had told him the firm's capital position violated Exchange and S.E.C. requirements. First of all, I have no recollection that Kilduff claimed to have discussed any S.E.C. requirement with Anderson at any time. In the second place, with respect to the alleged April 1969 incident to which Kilduff testified, Gov. Ex. 26 did not purport to be an accurate computation of the firm's net capital. On the contrary, it was a rough estimate based upon the estimates of others who were shown through the trial testimony to have made at least two errors of 1/2 million dollars each.
- 30. Indeed, even the occurrence of this meeting has been called in question because Gov. Ex. 26 noted a price of Clinton Oil stock as \$24 a share, which of necessity, pursuant to a document prepared by the Government (Def. Ex. K), did not happen until April 23rd or April 24th -- when Eucker, an alleged participant in the meeting, was in India. Eucker did not return until early May, by which time Mr. Anderson was no longer in the country.

Kilduff to support these allegations against Mr. Anderson, the jury's acquittal of Mr. Villani is particularly significant.

Kilduff placed Villani at just about every meeting at which he placed Anderson. The jury's acquittal of Villani demonstrates its disbelief of Kilduff on all of the issues raised in the U.

S. Attorney's letter of June 5, 1975. It was not only Mr.

Anderson whose testimony differed from Kilduff's on these questions. Villani's testimony was to like effect as was the testimony of Musil, who attended every one of the meetings and who had no recollection whatsoever of the comments which Kilduff claimed to have made at these times. Indeed, there were offered in evidence all the records of the meetings in question, the dates of which showed the regularity and continuity of these meetings. Schmidt also contradicted the testimony of Kilduff.

- 32. Mr. Anderson's testimony before the S.E.C. in
 1971 occurred 3 1/2 years before the trial, long before he
 was faced with a criminal prosecution and had a motive to lie.
 His testimony at trial did not vary from his testimony before
 the S.E.C.
- 33. The prosecution's final comment in its June 5, 1975 letter under the heading of perjury says: "Anderson stated that he never helped arrange a fictitious 80,000 share trade." On the contrary, in all material respects Anderson's testimony was the same as that of Clinton. Clinton testified that: "There was mostly a one-way conversation. Mr. Sloan

was talking to me" (2189-90). After Clinton testified that he was asked by Sloan to purchase 80,000 shares, the following testimony was given by Clinton:

"Q. What else was said? Let me ask you this, if I may: I understand your testimony, sir, that Mr. Sloan did the talking, is that right?

"A. Absolutely.

"Q. Did Mr. Anderson say anything at any point?

"A. Well, my general impression is that in all of my dealings when Mr. Sloan and Mr. Anderson were together, Mr. Sloan for all practical purposes did all the talking.

"Q. Do you recall, sir, at this meeting if Mr. Anderson said anything?

"A. If he did, it didn't impress me." (2192-3)

of perjury, which has now become significant in determining whether Anderson in fact heard all that was being discussed between Clinton and Sloan. The Court will recall that the meeting occurred in Clinton's bedroom at the Howard Johnson Motel in Memphis. His testimony in this regard was consistent with his testimony before the S.E.C. in the late Summer of 1971, three years before the case was presented to a grand jury, when recollections were still fresh and before he had any conceivable motive to lie about so trivial a matter. It was Clinton's trial testimony that the meeting occurred at the Memphis Country Club. However, in answer to the prosecutor's seemingly insignificant question, obviously anticipating cross-examination

on this issue, Clinton testified that he stayed overnight at the Howard Johnson in Memphis (2193). The significance of this is that Anderson was not seated around a table with Clinton, Sloan and Doggrell throughout the meeting listening to everything that was said by Sloan to Clinton; but, on the contrary, as he testified, there were times when he and Doggrell conversed apart from Sloan and Clinton.

35. Even according to Clinton, as he and Sloan parted, the lawyers were to work out the 80,000 share traue in order to determine which entity would in fact make the purchase. As cross-examination disclosed, Clinton had ample motive to effect the trade. Orvis controlled hundreds of thousands of shares of Clinton Oil stock, a volatile over-thecounter security, which Clinton and Gamelson feared Orvis would dump on the open market, thus sharply depressing the price of Clinton Oil stock to the detriment of Clinton Oil shareholders. Messrs. Clinton and Gamelson and their wives were major shareholders, holding more than \$10,000,000 worth of the stock. The Court will also recall the first telegram which stated: "In my opinion", there was no trade; and the Court further will recall Clinton's professed disclaimer of the trade by letter to Esskins & Sells, purporting to quote the telegram, which never in fact arrived at Haskins & Sells. Clinton's explanation at the trial was that because of certain family problems at the time, he could not in fact be sure that Supplemental Affidavit of Jerome J. Londin in Support of Sentencing Motion

the letter went out. Moreover, there was not a shred of

evidence that Mr. Anderson saw the telegram. Indeed, in the civil litigation instituted in this Court by the New York
Stock Exchange in 1971, unresolved to this day, the New York
Stock Exchange charged that Mr. Clinton and Clinton Oil in fact made that trade and effected all of the other Clinton Oil transactions in issue during this criminal trial.

- 36. Anderson's honest belief in the validity of the trade was shared by Kilduff, who testified he thought the trade was valid until the time of the liquidation in the Summer of 1970. Villani too thought it was a valid trade.
- claims that the only reason Anderson, among all the defendants, was not the subject of a disciplinary proceeding by the New York Stock Exchange was because of "a procedural foul-up."

 The source of the prosecutor's information is the liquidator, who is now actively engaged in civil litigation against Anderson, and, inter alia, against all the other partners of Orvis and Mr. Clinton and Clinton Oil. This litigation has been pending for many years. The litigation seeks to hold Anderson and all the others responsible for what transpired.
- 38. The Exchange's belated attempt to hold Mr.

 Anderson responsible is belied by its discussion with Peter
 Schmidt, who on August 12, 1970 reported to the Liquidating

Committee his conversation of August 12, 1970 with two officials of the Exchange and its senior counsel. In that memorandum, a copy of which is attached as Exhibit C, the officials of the New York Stock Exchange said that:

- ". . . the only partners who would be considered in this category [all major partners of Orvis] would be Mr. Sloan, the managing partner, Mr. Eucker, the partner in charge of operations and Mr. Kilduff, the partner in charge of the financial affairs of Orvis Bros. He indicated that the list of 'major' partners might be expanded, but it was unlikely this would be done."
- position with the large brokerage house of Halle & Stieglitz, a member of the New York Stock Exchange. I have been informed that Sloan, because of his controlling position at Orvis, was able to turn over to Halle & Stieglitz the cream of Orvis' business which brought him a senior vice-presidency at Halle & Stieglitz with a very high salary. I have been told that Sloan became one of the top men in Halle & Stieglitz. Sloan, because of his close association with Kamensky who, as the trial showed, supervised the Kane trading account, obtained for Kamensky a position at Halle & Stieglitz. When Halle & Stieglitz took over Orvis, Anderson was offered no position at all.
- 40. Exhibit C is also significant with respect to another major issue raised by the Court's letter of May 7, 1975 (Exhibit A), in showing the fear of the New York Stock Exchange:

- ". . . that a possible charge of operating while in capital violation might come from the SEC and if this were done, the charge might be brought jointly against Orvis Bros. and the NYSE for permitting the firm to continue operating after the Exchange had been advised that a capital violation might exist."
- 41. This establishes Mr. Anderson's contention that the Exchange knew since December 1969 of Orvis' capital violation and nevertheless permitted Orvis to continue its operations, thus waiving its Rule 325 -- the net capital rule.
- 42. The final matter raised in the U.S. Attorney's letter of June 5, 1975 deals with Myron Levine, a matter not referred to in the Court's letter of May 7, 1975 (Exhibit A). According to the June 5, 1975 letter (Exhibit B), the Court has requested from Mr. Levine "a letter with his explanation as to what transpired at the Exchange hearings which Kilduff and Peter Schmidt, Esq. attended." The U.S. Attorney's letter states that he has delivered to Mr. Levine "a copy of the transcript of Kilduff's and Schmidt's testimony at this trial." The U.S. Attorney's letter does not indicate whether the Court wished Mr. Levine to have these transcripts.
- 43. Mr. Schmidt testified on April 24, 1975. The substance of his testimony was that Kilduff falsely implicated others (I am concerned only with Mr. Anderson) after Mr. Levine had threatened Kilduff with prosecution.*

^{*&}quot;. . . he [Levine] was sure that others had participated in this wrongdoing, and that they would go easy on

Mr. Kilduff if he would tell what the others had done, otherwise, it would be very difficult for Mr. Kilduff' (2456).

* * *

"Two days later on March 18, at the close of a rather abbreviated session, again Mr. Levine spoke to me and Mr. Kilduff and in Mr. Kilduff's presence and indicated that he had very serious questions about Mr. Kilduff's credibility. He said that it was not possible that Mr. Kilduff had committed these acts by himself, he warned us that the investigation was quite serious and that in addition to the Stock Exchange investigation, the U. S. Attorney and the District Attorney might bet involved, that unless Mr. Kilduff was willing to indicate the extent to which the other people had been involved, it would be very difficult for him and that he, Levine, just did not believe, it was just not possible that Kilduff had committed these acts by himself.

"Q. Did he say anything about what would happen to Mr. Kilduff if he did or did not do certain things?

"A. To the best of my recollection, sir, he just basically said that things would be a lot easier for Mr. Kilduff if he involved the others and it would be very difficult for Mr. Kilduff if he did not." (2457)

* * *

"He [Kilduff] said well, I will tell the truth but they wont' believe me. He said, you heard what that guy said. They won't believe me if I tell the truth because I did it and I did it alone and he said, I want you to tell them that, I want you to tell Fergus and Bill that I did it, I did it because I tried to save the firm, I was sure that if we had some more time our net capital problems would have been solved, he said -- he said they were too dumb to understand the net capital rules, that only he understood what they meant and how they worked, and that he had tried to phony up the records that were supplied to the Stock Exchange in order to save this firm and save his job, and that they didn't know about this and they didn't participate in it.

"That is the substance of what he said." (2460-1)

44. Mr. Schmidt's cross-examination by the prosecutor consisted of the following, which cross-examination is quoted in full:

"CROSS EXAMINATION

"BY MR. FEINBERG:

"Q. Mr. Schmidt, I take it during this entire conversation with Mr. Kilduff on this last day, the lunch and during this entire period that Mr. Kilduff was very upset and very emotional, is that a fair characterization?

"A. He was upset, embarrassed and emotional, I would say, yes.

"MR. FEINBERG: No further questions.

"THE COURT: Thank you." (2464)

45. The following day, April 25, 1975, without the knowledge of the defense, the Court recalled Mr. Schmidt in the absence of the jury. After the Court stated that it had "asked Mr. Schmidt to come back for a few questions in the absence of the jury", the Court informed Mr. Schmidt that it was recalling him because it had a problem on a very crucial issue, whether Kilduff had made false statements against the defendants at the New York Stock Exchange to save his own neck and was thereafter stuck with the story when he was called by the U.S. Attorney's office (2604-5).*

^{*&}quot;BY THE COURT:

[&]quot;Q. Mr. Schmidt, thank you for coming back. I will tell you what my problem is. You see, whatever the outcome of this trial is, I have a problem of sentencing Mr. Kilduff. As counsel here may have heard me in discussing pleas with other defendants who may have been taken in the presence of.

- 46. Mr. Schmidt again testified that Mr. Levine, the attorney for the New York Stock Exchange, who took the deposition of Kilduff, had threatened Kilduff in his presence.*
- 47. The prosecutor then asked to have Levine called as a witness, and the Court said: "You can subpoena anybody you want." When the prosecutor again said: "But I think that Mr. Levine should be brought in and questions[ed]", the Court again responded: "You can subpoena anybody you want" (2615).
- 48. Even though the prosecution knew that Mr. Levine was still employed by the New York Stock Exchange, a few blocks from the courthouse, it did not call Mr. Levine for his testimony

counsel here, I don't care whether Mr. Kilduff's testimony results in a conviction or an acquittal. That is wholly no concern of mine.

"I only care whether he tells the truth. I have that problem when I sentence him.

"Your testimony and his are diametrically opposed on a very crucial issue, namely, whether any representative of the Stock Exchange told him to testify against other people in order to save his own neck generally.

"The reason that is crucial is that his first statements to the prosecution would appear to have been made immediately after these alleged conversations. Therefore, in fact, they took place, he might very well have made false statements against these people on the assumption the Stock Exchange could do something for him and felt stuck with that story, despite Mr. Feinberg's assurance that all he wanted was the truth."

*"At the conclusion of the third day's testimony when that document was presented and I requested the adjournment

and I first talked to Mr. Kilduff and I told him that we could not represent him, I felt we should go back and talk to my partner, it is at that point that Levine, the Stock Exchange man, came back in the room and said that he had very serious questions about Kilduff's credibility, that, in effect, he did not believe that Kilduff did this alone and that he was making it more difficult on himself because there were other people involved --" (2607).

* * *

"A. All right. That is when he said we know Mr. Kilduff is lying. We have very damaging evidence on Mr. Kilduff. We know he participated with others and we are going to prove it and you better advise your client that he is hurting himself. That was off the record, but I believe it was at the start of the second day's testimony.

- "Q. Was that in Mr. Kilduff's presence?
- "A. Yes, sir." (2608)

* * *

"A. There is a very big difference, your Honor. At the beginning of the second day's testimony it is my recollection that what they said to him in effect was 'We know you are lying, we have very damaging evidence on you, and we know you participated with others.'

"On the third day, after they presented this document, which was in his handwriting, because they kept asking him 'Did you ever prepare a document in your own writing that showed a net capital ratio of greater than 20:1,' he kept saying no, no, no, throughout three days of testimony. When they finally presented one that was in his handwriting, and I recognized it as his handwriting, I knew that he had been lying, and I asked for the adjournment, I talked with Tom privately.

"Then Levine came back in, and that is when he said in effect that they wouldn't believe him if he said he did it alone, that there were others involved, and, in addition, that there was going to be investigations by the SEC and the U.S. Attorney, and there is no question, your Honor, at that time and in his presence they specifically indicated that if he said he did it alone that they wouldn't believe it." (2612)

* * *

"A. Oh, what they did say, they said, 'We don't believe you did it alone, and if you persist in that you are only going to make it more difficult for yourself, and if you do involve the others, you will make it easier on yourself,' and that is as close as I can remember the actual words that were used.

When the Court in chambers asked the prosecutor why he had not called Levine, he answered that he could not locate him. Where was Mr. Levine from April 24th to April 28th? Did the Court know his office was a few blocks away? There was ample time for the prosecution to call Levine as a rebuttal witness, even if a brief continuance was necessary. It chose not to do so. Clearly, the time and place to inquire as to Kilduff's veracity was at the trial, where Levine's comments could be tested in the crucible of cross-examination.

[&]quot;Q. The proper interpretation of that is you don't get indicted for perjury if you tell the truth?

[&]quot;A. Your Honor, believe me, I am not trying to given an implication to what was said. That is for the jury to decide. I don't know. I took it, if you would like to know my opinion, I fully took it as a threat to Kilduff that, if --

[&]quot;Q. If he lied he would get indicted for perjury.

[&]quot;A. Maybe that is the proper interpretation, your Honor. I didn't take it as such at that time. This certainly wasn't my understanding. In fact, it wasn't Kilduff's because one of the things he said to me back in my office was clearly, he said -- when I said go home and talk to your wife and tell her the truth, he says, but nobody will believe the truth. You heard what they said. He knew the same interpretation that I had taken from it. Whether that was a correct interpretation, I am not a trial lawyer, your Honor, and I was doing a favor for a friend. I don't know whether Levine was talking about perjury or the other thing. I clearly assumed that he was implying that in effect a deal type thing. 'If you involve the others, we will go easy on you.'

[&]quot;I don't think he was talking about perjury.

[&]quot;MR. LONDIN: Your Honor, may I tell the Court that that was the Stock Exchange hearing, it was not under oath, those proceedings. I don't think perjury enters into it at all" (2613-14).

- 49. No letter from Levine, prepared days or weeks after reading the testimony of Mesers. Schmidt and Kilduff, will satisfy the demands of Due Process. In the expectation that Levine would be called as a rebuttal witness, the defense had witnesses and documents prepared for surrebuttal in order to establish Mr. Levine's threats to other partners of Orvis. Reference has already been made in my affidavit of June 9, 1975 to Mr. Levine's threat "to nail Sloan" and to the dispute between Mr. Levine and Sloan's attorney (Mr. Tolan of Olwine, Connelly, Chase, O'Donnell & Wehyer) as to Mr. Levine's veracity. The defense had other witnesses and other documents to prove that Levine had made threats to refer the Orvis Matter to the S.E.C. and the U.S. Attorney's office, similar to his threat to turn Kilduff's matter over to the S.E.C. and to the U.S. Attorney's office. This evidence will be available should a hearing be required. The threat was not what the New York Stock Exchange could do, but rather what the S.E.C. and the U.S. Attorney could do. I have been told that Mr. Levine in fact carried out just such a threat and called the Orvis matter to the attention of the S.E.C.
- 50. In sum, the testimony of Mr. Schmidt as to threats made by Levine to Kilduff stands unrebutted. Just as Mr. Higgins (who belatedly presented the case to the grand

234a

Supplemental Affidavit of Jerome J. Londin in Support of Sentencing Motion

jury) failed to call Mr. Schmidt*, so the prosecution at this trial failed to call Mr. Levine.

*See my affidavit of June 9, 1975, paragraphs 74-77. See also Mr. Schmidt's testimony before the Court on April 25, 1975, when he was recalled by the Court:

"EXAMINATION BY

"MR. LONDIN:

"Q. Did you have some discussion about this conversation back around the time of the indictment with Mr. Higgins, at the time Mr. Higgins was --

"A. Oh, yes.

"Q. Would you tell the Court about what happened?

"THE COURT: Who is Mr. Higgins?

"MR. LONDIN: He was the Assistant United States Attorney who presented the case to the grand jury.

"A. Mr. Higgins called me up and said, 'I understand you had a conversation with Kilduff a long time ago,' and I said, 'Yes.'

"He said, 'Would you tell me about it?'

"I said, 'No.'

"He said, 'Why not?'

"I said, 'Because of this privilege thing.'

"He said, 'I will get kilduff's attorney to write you a letter confirming that Kilduff has waived the privilege as to that conversation.'

"I then got a letter from Butowsky which was very vague. It said something like, 'I understand that Mr. Kilduff has testified about certain conversations with you and to the extent that is true the privilege is waived.'

"So Higgins called me back and said, 'Will you testify now?'

- 51. Should Mr. Anderson's motion pursuant to Rules 29(c) and 33 be denied, it is respectfully submitted that no jail sentence should, or indeed could, be imposed by virtue of Section 32(a) of the Securities Exchange Act of 1934 (Title 15, U.S. Code, §78ff(a)). This Section is the penal provision of that Act, which makes unlawful a violation of an S.E.C. rule and prescribes the punishment for such violation.
- 52. It is the violation of this Section, charged in the indictment, that was the object of the conspiracy presented to the jury. The conspiracy section, Title 18, U.S. Code, §371, provides in pertinent part:

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

[&]quot;I said, 'No, I don't feel this lever [letter] is adequate and I will not testify,' but I said, 'If you call me down, I will ask the judge to rule on it.'

[&]quot;He said he would get back to me, and I don't believe -- I may have talked to him one more time after that briefly, but he never got back to me after that.

[&]quot;Q. He never got back to you or sought a ruling on the question of privilege, is that correct?

[&]quot;A. That is correct." (2624-5)

53. It is, therefore, necessary to determine whether "the offense, the commission of which is the object of the conspiracy, is a misdemeanor only". For that purpose we must look to Title 18, U.S. Code, §1 which provides:

"Notwithstanding any Act of Congress to the contrary:

- "(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
 - "(2) Any other offense is a misdemeanor.
- "(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both, is a petty offense."
- 54. Because Mr. Anderson had no knowledge of Rules
 17a-3, 17a-4 and 17a-5 (see his annexed affidavit dated June
 12, 1975), the rules he was convicted of conspiring to violate,
 under the provisions of Section 32(a) of the Securities Exchange
 Act of 1934 (Title 15, U.S. Code, §17ff(a)), he may not be
 imprisoned, but may only be fined an amount not to exceed \$10,000
 Section 32(a) provides in pertinent part that:

"shall upon conviction be fined not more than \$10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding \$500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation."

55. Therefore, in view of the sentencing provisions of Section 32(a) of the Exchange Act (Title 15, U.S. Code, \$78ff(a)), the substantive violation is a misdemeanor as defined in Title 18, U.S. Code, \$1, and, under Title 18, U.S. Code, \$371 "the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor" -- a fine of \$10,000.

CONCLUSION

56. It is respectfully submitted that Mr. Anderson's motion under Section 29(c) should be granted, and that a verdict of acquittal should be entered. Alternatively, if such relief not be granted, a new trial should be ordered in the interests of justice. Finally, if such relief be denied, it is respectfully submitted that a sentence of imprisonment should not be imposed.

JEROME J. LONDIN

Sworn to before me, this

12th day of June, 1975

marianie Theney

MARIANNE HENEY

Motary Public, State of New York

Ito, 41-6552250

Qualific discounts County

Certificate filed in New York County

Commission Expires March 30, 197

238a EXHIBIT A ANNEXED TO SUPPLEMENTAL AFFIDAVIT UNITED STATES DISTRICT COURT CHAMBERS OF WHITMAN KNAPP UNITED STATES DISTRICT JUDGE UNITED STAILS COURTH USE NEW YORK, N. Y. 10007 May 7, 1975 Paul C. Curran United States Attorney Cae St. Dadrew's Plaga New York, New York 10007 Attention: Kennoth Foinborg Assistant U. S. Attorney Re: U. S. V. Sloan, et al-74 Cr. 859 Dear Mr. Meinberg: I remains that the Government make recommendations of centerce with respect to the defendants Sloan, Bucker and Anderson. Among other things, I should like enlightenment on the following questions: (a) Is the Covernment in a position to estimate the extent of financial loss occasioned by defendants' illegal activities, i.e., how much, if any, cash would have been saved had defendants promptly and accurately reported the firmin dateriorating financial condition to the SEC and the Exchange? (b) That individuals or indiffutions were required to foot the bill? (c) Is the Government in a position on the basis of evidence before it to suggest a relative evaluation of guilt as between the three above-named defendants?

- 2 -

- (d) To what extent, if any, did any defendant commit perjury in an effort to avoid discovery?
- (c) Any other considerations the Government may deem pertinent.

I plan to adjourn all sentences (including that of defendant Kilduff) to June 16th at 2:00 P.M. in Room 500, and direct that any recommendation be in my hands (after having been served on counsel for the several defendants) at least a week become toon.

Sincerely,

cc: Jerome Londin, Esq.
Stanley S. Arkin, Esq.
Roy Cohn, Hsq.
Butowsky, Schwenke & Devine

240a EXHIBIT B ARLEXED TO SUPPLEMENTAL AFFIDAVIT

RRF: 1m

June 5, 1975

Honorable Unitman Knapp United States District Judge United States Courshouse Loca 3004 Foley Square How York, Han York 10007

Re: United States v. Ferrus Sican, et al.

Dear Judge Enapp:

Pursuant to your letter of May 7, in which you recuest certain information relative to the financial less occasioned by the demise of Grvis Brothers, as well as a relative evaluation of the guilt of Slain, Anderson and Tooker and whether they consisted parjury in an effect to avoid discovery, the Government supplies you with the following information:

Mr. Ragusin, the liquidator of the sirm, that the New York Stock Exchange suffered a direct loss of 3 1/2 million dollars arising out of Orvis Brothers' failure. This money was paid out of a special trust fund that was funded by broker sombers of the Emchange. However, I in also told by Nr. Brough that the Orvis firm did not participate in the funding of this trust fund since the fund didn't commone until June of 1273, when Orvis was about to go unler. Accordingly, the defendants are in no position to argue that the money used to liquidate Orvis Brothers came, in part, from the firm itself.

KRF: la

Honorable Thitism Enapp United States District Judge -2-

Juno 5, 1975

The 3 1/2 million dollars was used primarily to substitute for the conteners scentities that had been hypothecated to banks in the United States and Canada. Hr. Requests reminds me that, if Orgis had been liquidated in the spring of 1959, the hypothecation figure would have been less than six million dollars. Thus, the delay enused by the defendants activities led to a hypothecation figure almost double that which emisted in the spring of 1959 (from less than six million to 11 million in July, 1970).

In addition, the limited partners, subordinated lenders and general partners of Orvis Brothers, unaware of the fraud being consisted by the Jour defendants, lost their com investments, estimated to be around \$5,000,000.

The third grown involved in the liquidation of Orvis were the general ereditors of the firm. At the time of the liquidation Mr. Regusin was fereed to pay ereditors only 15 to 30 cents on the dollar for dente outstanding; as a result Mr. Regusin informs me that close to \$400.000 was lost by creditors who were unable to receive full payment from Cryis of bills caestanding. Dinally, the cretoyers of Cryis, numering close to four huntred, had their jobs terminated abrustly in the survey of 1970 and did not receive any of the severance pay to which they were entitled. This amount is estimated to be \$50,000.

Hr. Requested two important observations about the loss endfered by the partners and firm lenders. If the firm had been themised in the spring of 1959 it is highly likely that the nermors would still have been wined out; but the highlication of their accounts (valued unward by the fact that the stocks in their accounts were generally binher at the time) would not have made it necessary to resort to the Exchange trust fund (even if one existed) - at least not in an amount anywhere near 3 1/2 million dollars. Ferhaps more importantly, the Court undoubtedly recalls the testimony from various witnesses at trial, confirmed

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Honorable Unitman Knapp United States District Judge

-3-

Juna 5, 1975

by Mr. Rogusin, that, even while the froud was being perpetrated, new partners were being invited to invest capital in Orvis.

Partners such as Teurnet (1/2% interest) and Harretta (0150,000) ware asked to rad, in fact, did invest well after the firm should have ceased doing business. They also were wiped out.

- (b) Individuals and Institutions Paving the Fills As I have already indicated, the New York Stock Americanya, carough its special trust time, paid a major newtion of the Grais debt; in addition, the placent the limited partners, supercinated leaders and general creditors also "foot the bill."
- (c) Pelativa Evaluation of Chilt In evaluating the relative guilt of Joan, Andreson and Junier, the Covernment points primarily to the fact that, despite Anderson's protestations to the contrors, he and Sloon hore the major responsibility of running the firm. Sloan was the managing partner of Orvis, the individual who actually ran the company during 1939 and 70. He pleaded guiley to comenfuccy, and was familiar with avery facet of Orvis' operations. Anderson was the Chalman of the Brecutive Committee, and an individual two had invesced, directly and timerah relatives and Ariends, one 11.200,000 in the Mire. It is true that section Sloomnor Anderson ever hade any appealing tales energes on the books, nor did they file any raise documents with the SEC under their orn signature. However, Anderson and Sloan both knew what was hoppening and were in a position to prevent it. Instead they promoted this sabena and told Filduff, in offert, to falsily and edu una egradan, ear mos, rull edu so notolimas ent ese curareso sho. Miliuff and Duelor ware the machanies, but both Sloan and Anderson were the undiviying busies or the scheme.

Donald Tucker was somewhat below Anderson and Sleen in the general scheme of things. Eucker is directly responsible for the illegal hypothecation of customer securities which, by May of 1970, totaled some il million dollars. Eucker directed various employees of Crvis to use these customer securities as

ERF: 1m

Honorable Viitman Enapp United States District Judge

-4-

June 5, 1975

collateral to secure Orvis bank loans. When the firm was liquidated, Regusin was able to substitute than assets for around 8 1/2 million deliars of the hypothecated securities. The rest was paid out primarily by the how York Stock Exchange Trust Fund. There is a serious coastion as to whether Slean or Anderson were ever made aware of the extent of Encker's hypothecation. Clearly, Kilduff was in the dark about it.

In addition, one should not ignore the testimony at trial for vichesnes such as Mactei and Pascons that Bucher, not Kilduff, assured than that although the bookkeeping practices were questionable, Bucher would have no trouble convincing the Enchange that everything was all right.

(d) Pariory - The Court also asks if Sloan, Anderson and/or Enchor committed perjary. The answer must be yes, all three defendants lains under each at the SEC in 1971, and Anderson lying when he took the stand in the procent trial. Thus, Sloan testified at the SEC that he had no introduced that certain translations were being last on the Gaven proke improverly simply to improve the Aire's conital periods. Andre is then told the CEC in was not sure to a cay contains a resident misted and, in say event had no knowledge of any improper pockacepang. Lith particular reference to the 60,000 share trade to the Clinton Pension Yund, Slean claimed no impropriety.

Inderson percentedly testified at the SUG that he had have eased out of where at the firm by Globa and that he had no centrol ever Crvic roticy. In addition, he told the SUG what he was totally unusure of any recassations being placed in the bodies improperly simply to improve the firm's capital position. At the tipl Anderson testadied that he was never told by Mildest that the firm's capital position was in violation of Emchange and SUC requirements; in addition, Anderson stated that he never helped

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Honorable Viitman Knapp United States District Judge

. 5-

June 5, 1975

arrange a fictitious 80,000 share trade used to inflate Orvis capital with Clinton. Anderson testified that he was unaware of any impreper transactions or bookkeeping.

Eucker testified at the SEC that he was unaware that certain had debt accounts were being treated on the books as good customer each accounts, and stated thatthe firm's capital position always satisfied Euchenge resultements. Eucker also stated that he had no knowledge of any improper transactions being placed on the Orvis books.

These examples of the sworn testimony of Sloan, Anderson and Eucker are directly contrary to the testimony of Kilduff and other witnesses at trial. Anderson's claim, in particular, that he was without power at Orvis is contradicted not only by Kilduff and the other general partners who testified at trial, but by the defendant Eucker himself, who told the SEC that Sloan and Anderson ran the firm.

(a) Other Considerations - After pleading guilty, both Sloom and English with the on the operation in my office to discuss the error in propagation for the total against Indexes. They were both less than condid, playing down their can involvement at the expense of Anderson. Neither testified at trial.

It should only be noted that only Anderson, among all the defendants, was rever proceduted by the New York Stock Embange in a disciplinary proceeding. The Liquidator indume me that the only resen Anderson avoided on Amehange disciplinary hearing is because the Emehange, in a procedural dest-up, failed to prodder charges against Anderson within thirty days of Anderson's resignation from the Emehange. Under Emchange rules, any disciplinary action then became time-barred.

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Honorable Whitman Knapp United States District Judge

-6. June 5, 1975

The Government has also notified livron Levine that the Court recuents from and a lorder with his emplanation to that transpired at the Exchange hearings thich Hildsif and Teter Schmidt, Esq. attended. A copy of the transcript of Kildaff's and Schmidt's testimony at this trial has been callyared to Levine with instruction that Levine's letter to mailed to the Court by June 11.

Very truly yours,

PAUL J. CURREN United States Attorney

By:

KUNETH N. PANISORS Assistant United States Attorney Talaphone: (212) 791-1933

Jaroma Londin, Esq. cc: 10 Page Auch Street Now Yours, New York

> Ray Colm, Dag. 39 East 68th Street New York, New York

Stanley Arbin, Pro. 300 Paulson Avones Haw York, Hew Lock

Dave Butomaky, Esq. 220 Fark Avenue How York, How York

246a EXHIBIT C ANNEXED TO SUPPLEMENTAL AFFIDAVIT

August 12, 1979

Memo To: The Liquidating Constittee

Set forth below is a summary of a conversation I had today, August 12, 1970, with Rebart Bishop and Fred A. Stock of the New York Stock Emphange and Samuel J. Rosenbeury of Milbank, Tweed, Hadley & McCley, counsel for the New York Stock Exchange. I had called Mr. Stock to enquire as to the status of the appointment of a liquidator by the New York Stock Exchange and to clarify the status of each of the partners of Orvis Bros. in connection with employment of them by other member firms.

After advising me that the Exchange was still seeking to obtain the signatures of Out Reston and George Vautes to the Liquidation Agreement, Fr. Stock on put ma on a speaker phone in order to have Mr. Dishop and Mr. Rosenberry participate in the conversation.

Mr. Bishop first advised me that no partner of Orvis

Bros. could be approved at this time as a member or an allied
member of the Mow Mork Stock Enghance until it had then deternized whather or not they were potentially insolvent. Since
the insolvency of the partners of Orvis Pros. will not be
determined for some time, he anticaked that the Boals of
Governous would not approve they partner is a series or an
allied member of another firm in the immediate former.

With the exception of what he called the "major" partners of Orvis Bros., Mr. Bishop indicated that has Exchange would approve and would expedite the approval of any partner of Orvis as an employee in any other mamber firm. There employees would be permitted to take Empervisory of nanagerian positions including positions as department hands or branch office managers of another pember firm.

With respect to the so-called "major" partners,

Mr. Bishop indicated that of the passant time, the only partners who would be considered in this catagory would be Mr. Sloan, the managing partner, Mr. Bucker, the partner in charge of the finanoperations and Mr. Kilduff, the partner in charge of the financial affairs of Orvis Bros. He indicated that the list of
"major" partners might be expanded, but it was unlikely thir would be done. The "major" partners would be permitted to
take positions as registered representatives in any other member
firm immediately. These persons would not, however, be permitted

247a Exhibit C Annexed to Supplemental Affidavit

-2-

to take managerial or supervisory positions for approximately three months or until the Exchange had determined whether or not any charges would be brought against the "major" partners.

on the information evailable to it, the Exchange was not contemplating bringing any charges against the "major" pertners for fraud, misrepresentations, or making incorrect statements to the Exchange. The likelihood was that charges, if brought, would be based on lack of adequate supervision. In this area, he indicated that the two principal grounds for criticism appeared to be the large losses taken by the firm in the socalled "Kane" trading account and the firm's lack of supervision of Mr. Netelkos.

Mr. Bishop indicated that any partner who wished to expedite his approval in another firm should clear his status with Mr. Request. By giving Mr. Request a detailed outline of his duties and responsibilities at Orvis, Mr. Raguein vould be able to determine whether or not that person might be included in any possible future charges as a "major" partner. He also indicated that the charges that might be brought, if any, would result in a possible consure and fine rather than a suspension. Source, if subsequent events led the Exchange to seek suspension of any partner, the time from June 4, 1970, when Orgis officially began liquidation, would count as part of the suspension paried.

Mr. Dishop Finally indicated that the Exchange was Extremely pleased with the operations and results of the Liquidation Counities since it had been formed. He acknowledged that the Liquidation Counities had already solved many difficult problems and that the Exchange would not, under any circumstances, criticise the Committee for the actions it had taken.

On the following day, August 13, 1970, I had a further telephone conversation with Mr. Stock with particular reference to the docision made by Halle & Stieghitz not to hire Mr. Slean in an administrative position. He indicated that it was his impression that Halle was unwilling to hire Mr. Slean if there was any possibility that sharges might be brought against him in the future because of the possibility of adverse publicity.

Mr. Stock also pointed out, however, that the Exchange might seek to hold the "major" partners of Orvis responsible for conducting business while in capital violation. I against him that we had advised the Exchange as soon as we were aware that the firm might be in capital violation. Mr. Stock acknowledged

248a Exhibit C Annexed to Supplemental Affidavit

-3-

this and indicated he had previously read a copy of a statement made by Messas. Sieen and Anderson to dank newman at the MYSE towards the end of May. He further indicated that a possible charge of operating while in capital violation might came from the SEC and if this were done, the charge might be brought jointly against Orvis Buos, and the MYSE for permitting the firm to continue operating after the Exchange had been advised that a capital violation might exist.

PGS/af

Peter G. Schmidt

249a AFFIDAVIT OF CARL W. ANDERSON IN SUPPORT OF SENTENCING MOTION

:

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, : 74 Cr. 859 (WK)

CARL W. AMDERSON, et al.,

AFFIDAVIT

Defendants.

STATE OF NEW YORK)

SS.:

COUNTY OF NEW YORK)

CARL W. ANDERSON, being duly sworn, deposes and says:

1. In 1962 I became a partner of a member firm of the New York Stock Exchange. By virtue of being a partner of that member firm I became an allied member of the New York Stock Exchange. In 1962 the requirements to be an allied member were quite different from the requirements of the post-1968 period. At the time I became an allied member of the New York Stock Exchange I was only held responsible for reading the Constitution of the New York Stock Exchange. In approximately 1968 the requirements to qualify as an allie, member were substantially changed in that new members were required to go to the New York Institute of Finance or have special tutoring in order to prepare for the partners' examination. The partners' examination covered not only the Constitution of the New York Stock Exchange but rules and regulations of the Securities Act of 1933 and the Securities Exchange Act of 1934.

250a Affidavit of Carl W. Anderson in Support of Sentencing Motion

- 2. I never had to take such an examination as it was not required. Therefore, I did not go to the New York Institute of Finance nor did I have special tutoring. As a result, I was not made aware of the various sections in the Securities Act of 1933 nor in the Securities Exchange Act of 1934.
- 3. I did not know what information was required to be sent to the Securities and Exchange Commission by our auditors or staff accountants. I am not familiar with and had no knowledge of Rules 17a-3, 17a-4 and 17a-5 of the Securities Exchange Act of 1934. These sections only became familiar to me after the indictment in 1974.

CARL W. ANDERSON

Sworn to before me, this

12th day of June, 1975

MARIANNE HENEY
Notary Public, State of New York
No. 41-6-52-50

Qualified in the second County Cent feate files in New York County (Commission Expires March 30, 197_6)

251a MEMORANDUM OPINION AND ORDER ON SENTENCING MOTION

Dogy

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI and THOMAS C. KILDUFF,

Defendants.

MEMORANDUM AND ORDER

Million Decession of week ...

74 Cr. 859

#42730

KNAPP, D.J.

Defendant Carl W. Anderson moves to set aside this

Court's sentence of imprisonment imposed on June 16, 1975. He

argues that no imprisonment may be imposed under the circumstances

of this case because of the peculiar interplay of the conspiracy

statute, 18 U.S.C. §371, and the sentencing provision of the

Securities Exchange Act of 1934, 15 U.S.C. §78ff(a). We disagree.

The defendant was convicted after a month-long jury trial of conspiring to violate the federal securities laws, particularly 15 U.S.C. \$78q(a) and three Securities and Exchange Commission regulations promulgated thereunder, 17 C.F.R. \$6240.17a-3, 4, and 5. The cited statute provides, in pertinent part, that

252a Memorandum Opinion and Order on Sentencing Motion every broker or dealer "shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors." The three SEC regulations here involved - promulgated pursuant to that statute - list the specific records and documents that must be accurately made, preserved and filed. The charges in this case arose out of the financial collapse of Orvis Brothers & Co., a member of the New York Stock Exchange. The motivation for the conspiracy, according to the government's proof at trial, was a desire among certain partners at Orvis, including Anderson, to hide the fact of the firm's deteriorating financial condition from the Stock Exchange and the appropriate regulatory agencies. The method for achieving this purpose was the making and filing of inaccurate records and documents, all in contravention of the securities laws. The main issueslitigated at Anderson's trial were twofold: first, was there a conspiracy among certain of the partners at Orvis to maintain false records and file false financial statements with the SEC; and secondly, was the defendant Anderson a knowing and wilful participant in such an unlawful enterprise. The jury resolved both of these issues against the defendant.

253a Memorandum Opinion and Order on Sentencing Motion

In arguing against the imposition of a jail sentence, Anderson relies, as noted above, on the interplay between the conspiracy section under which he was convicted, 18 U.S.C. §§371, and the penal provision of the Securities Act, 15 U.S.C. §78ff(a).

The conspiracy provision, after defining the crime and prescribing the penalty, contains a proviso which states:

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Anderson thus maintains that it is necessary to determine whether the conspiracy of which he was convicted had as its object the commission of an offense which is solely a misdemeanor. This inquiry requires reference to 15 U.S.C. §78ff(a), the penal provision of the 1934 Securities Act. This statute, which reads as follows,

"(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 780 of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$10,000, or imprisoned not more than two years, or both, enget that when such person is an exchange, a fine not xcceding \$500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation." (emphasis added)

Memorandum Opinion and Order on Sente cing Motion

makes the violation of the securities laws a felony. However,
the statute's final clause (emphasized in the above quotation) carves
out a special exception which shibits imprisonment of a person
convicted under 15 U.S.C. §78ff(a) for a violation of a rule or
regulation of which such person was wholly ignorant.

proviso, Anderson claims that because he was wholly ignorant of the specific requirements set forth in SEC regulations 17 C.F.R. \$\$240.17a-3, 4 and 5, he would only be subject to punishment under 15 U.S.C. \$78ff(a) by a fine not to exceed \$10,000. Since any offense punishable by a fine only is classified as a misdemeanor, Anderson completes his syllogism by concluding that he can only be fined up to \$10,000 on the conspiracy conviction.

The weakness in this argument is that it is based on an inaccurate interpretation of the purposes of the "no knowledge" proviso in

15 U.S.C. §78ff(a). This clause is rather unique in that it permits a

defendant prior to sentencing to rebut the presumption that he had knowledge of the rule or regulation of which he had been convicted of

violating. It was included in the 1934 Act as a compromise measure

to allay certain fears in Congress that, by enacting a vast new

securities statute giving broad rule-making authority to the SEC,

and by making violations of such rules criminal, the legislators were

Memorandum Opinion and Order on Sentencing Motion subjecting totally "innocent" people - persons who might act without knowledge that their conduct was now prohibited by a rule - to possible incarceration. The compromise impliedly recognized that under such circumstances, strict adherence to the presumption of knowledge of the law would be unwarranted. See, Herlands, Criminal Aspects of the Securities Exchange Act of 1934, 21 Virginia L. Rev. 139, 190-193 (1934); United States v. Lilley (S.D. Texas 1968) 291 F. Supp. 989; United States v. Guterma (S.D.N.Y. 1960) 189 F. Supp. 265.

It is equally clear, however, that Congress did intend to maintain the usual presumption of knowledge with respect to the standards prescribed in the securities acts themselves. The "no knowledge" proviso is explicitly limited to lack of knowledge of a "rule or regulation". Congress did not intend that the protection of the "no knowledge" clause would extend to persons who were charged with knowing their conduct to be in violation of law, but did not happen to know that it was also in violation of a particular SEC rule or regulation.

See, United States v. Lilley, supra, 291 F. Supp. 989, 993.

It is this latter situation that we here encounter.

Anderson is not a totally innocent person who committed a non-wilful technical violation of an SEC rule or regulation. Anderson was accused and convicted of conspiring to violate 15 U.S.C. §78q(a) which makes it a crime to make and file false and inaccurate records and documents. In order to convict him of this offense, the jury was required to find

Memorandum Opinion and Order on Sentencing Motion
that he had formulated the deliberate intent to further an unlawful
objective. Thus, the court instructed the jury that Anderson could
not be deemed a conspirator unless he had (TR 3031-2):

"Knowledge of the basic unlawful object of the conspiracy, in this case, deceptive record keeping and deceptive filing with the S.E.C. to conceal financial weakness; and that it was his deliberate intent to further that unlawful objective."

Under these circumstances, it seems irrelevant whether Anderson knew of the specific rules which were violated. The "no knowledge" proviso was not intended to permit one who knowingly conspires to violate the general standard of conduct set forth in 15 U.S.C. §78q(a) to claim protection on the ground that he did not have knowledge of some specific rule or requirement promulgated thereunder. Such an interpretation would go well beyond what Congress intended when it inserted the "no knowledge" proviso and would be wholly inconsistent with the substantive law of conspiracy, which makes one co-conspirator liable for acts cormitted by other co-conspirators done in furtherance of the conspiracy, Pinkerton v. United States (1946) 328 U.S. 640.

As we have now made clear, we deem it immaterial whether or not Anderson was aware of the existence of the particular rule which required the filing of any particular record or document found to have been false. We may observe, however, that if this conclusion should be found erroneous, we would find no persuasive reason for

Memorandum Opinion and Order on Sentencing Motion
disbelieving Anderson's testimony that he had been unaware of the
specific requirements of 17 C.R.R. §240.17a-3, 4, and 5. Indeed,
the verdict of acquittal on the substantive count may have been
based on the jury's acceptance - at least to the extent of creating
a reasonable doubt - of Anderson's testimony in this general regard.
The charge on this count required a specific finding that the particular false filing had been within Anderson's "reasonable contemplation.

Accordingly, Anderson's motion to set aside the sentence of imprisonment is denied. Final judgment will enter within five days. The execution of sentence will be stayed pending appeal.

SO ORDERED.

Dated: New York, New York

July 1, 1975.

WHITMAN KNAPP, U.S.B.

258a Memorandum Opinion and Order on Sentencing Motion

FOOTNOTES

18 U.S.C. §1 classifies offenses as follows:

1/

"Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both, is a petty offense.

As is apparent from a careful reading of both 18 U.S.C. §371 and 15 U.S.C. §78ff(a), the "no knowledge" proviso may not even apply to sentences under the conspiracy statute. A violation of 15 U.S.C. §78ff(a), for example, is not a "misdemeanor only" since the crime is punishable by more than one year imprisonment. Secondly, the "no knowledge" proviso only modifies the felony penalty if the defendant is "subject to imprisonment under this section for the violation of any rule or regulation" (emphasis added). In the case at bar, Anderson is being sentenced under 18 U.S.C. §371 and not 15 U.S.C. §78ff(a).

3/ See, 18 U.S.C. §1, supra, n.1.

The charge given on the substantive count was more favorable to Anderson than the charge specifically approved in Pinkerton v.
United States (1946) 328 U.S. 640. It comports to, what in our view, is the practice of this Circuit. Cf. Pinkerton v.
United States, Supra, 328 U.S. at 647-648.

JUDGMENT CURRECTED RECTED United CARL W. ANDERSON Lthe SOUTHERN DISTRICT of MEW YORK **SEEMBANT** 74 Cr. 859 DOCKET NO. -L JUDGMENT AND PROBATION/COMMITMENT ORDER In the presence of the attorney for the government the defendant appeared in person on this date -COUNSEL J WITHOUT COUNSEL However the court advised defendant of right to couns have counsel appointed by the court and the defendant their Lierome I. Londin, Esq. J WITH COUNSEL DISTRICK GUILTY, and the court being satisfied that GUILTED _ NOLO CONTENDERE, PLEA there is a factual basis for the plea, J NOT GUILTY. Defendant is discharged There being attentiverdict of Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowings combining, conspiring, confederating and agreeing with others to combining against the United States in the violation of T. 15, -U.S.C., 189(a) and 78ff; 17 C.F.R. \$\$240.17a-3, 240.17a-4 and 240.17a-5 [F. 1] U.S.C., \$371). FINDING & U.S.C., \$371). Ati The court asked whether defendant had anything to say why judgment should not be prowat shown, or appeared to the court, the court adjudged the defendant guilty as charge hereby committed to the custody of the Attorney General or his authorized repre year and one (1) day. Execution of the sentence is stayed pendin Present bail continued and defendant to file new bail pending SENTENCE OR PROBATION 6 ORDER SPECIAL COMDITIONS וער בארנעיינו יוו OF PROBATION 1133 19 bt. 1913 C Den trans 120 no burish roubholed Manufic issiled a ADDITIONAL In addition to the special conditions of probation imposed above, it is hereby ordered that the galactat conditions of probation, reduce or external state of this judgment be imposed. The Court may change the conditions of probation, reduce or external state of this judgment be imposed. The Court may change the conditions of probation, reduce or external state of the probation period of five years permitted by the probation for a violation occurring during the probation period. CONDITIONS . 07 PROBATION The court orders commitment to the custody of the Attorney General and recommends, COMMITMENT RECOMMEN-DATION Milwhin

260a NOTICE OF APPEAL

UNITED STATES DISTRICT COURT

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Copy received from U.S. District COPY FOR DEFENDANT Court.

Service of this a cipics of the within is admitted this 21" day of August 1975

John D. Sordan III. Jer mkathending, Leny

Copies delward to: Mauley S. Arkin, Esq.
300 Madison Ave.
New York, N.G.
and
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39 E. 68 I New York, N.G.